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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959.

No. 291

JULIUS RUBEN,

Appellant,

vs.

THE CITY OF LOS ANGELES, including members of City Council, City Clerk, and Mayor,

LOS ANGELES DODGERS,

Appellees.

On Appeal From the Supreme Court of the State of California

STATEMENT OF JURISDICTION.

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SUBJECT INDEX

	PAGE
Opening Statement	1
Opinions Below	3
Jurisdiction	3
Cases Believed to Sustain Jurisdiction	5
Statute Involved	6
Questions Presented	10
Statement of the Case	11
1. The Material Facts	11
2. Raising the Federal Questions	16
The Federal Questions Are Substantial	20

APPENDICES:	PAGE
Appendix A. Opinion of the California Supreme Court	1
Appendix B. Memorandum Decision in the Superior Court	16
Appendix C. Los Angeles City Ordinance No. 110,204	27

TABLE OF AUTHORITIES CITED

CASES

	PAGE
Atchison v. Public Utilities, 345 U. S. 340	5
Cole v. Grange, 113 U. S. 1	6
Fallbrook Irrigation District v. Bradley, 164 U. S. 112	5
Jones v. City of Portland, 245 U. S. 217	5
Loan Association v. Topeka, 87 U. S. (20 Wall.) 655	6, 20
Osborne v. County of Adams, 106 U. S. 181	6
Ottoway v. Kearey, 108 U. S. 110	6
Parkersburg v. Brown, 106 U. S. 487	6
Society for Savings v. Bower, 349 U. S. 143	21
Staub v. City of Baxter, 78 S. Ct. 277	5
United States v. City of Detroit, 355 U. S. 466	21
United States ex rel. Tenn. Valley Authority v. Welch, 327 U. S. 546	9

STATUTES

Los Angeles City Ordinance 110,204	3, 4, 6, 10, 11
California Constitution, Art. IV, Sec. 31	18, 19
United States Code Annotated, Title 28, Sec. 1257(2)	5
United States Constitution, Fourteenth Amendment	5, 10, 11, 16, 17, 18, 19, 21

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On Appeal From the Supreme Court of the State of California.

STATEMENT OF JURISDICTION.

Opening Statement.

This is an Appeal from a Judgment of the Supreme Court of the State of California in case L. A. 25113, *City of Los Angeles v. Superior Court of Los Angeles County.* In its Judgment in case L. A. 25113 the California Supreme Court resolved questions which had been raised in the Los Angeles Superior Court in case 687210, *Ruben v. City of Los Angeles,* and case 699077, *Kirshbaum v.*

City of Los Angeles. These cases were combined for trial. Appellant Kirshbaum has previously filed an Appeal with this Court from the Judgment of the California Supreme Court in case L. A. 25113, docketed as case 155, October 1959 term.

This second Statement of Jurisdiction is submitted by Appellant Kirshbaum pursuant to an order of Honorable Hugo L. Black, Associate Justice of this Court, entered July 13, 1959, in *Ruben v. City of Los Angeles*, and extending the time for filing an Appeal with this Court in said case to and including August 10, 1959.*

The purpose of this second Statement of Jurisdiction by Appellant Kirshbaum, is to disclose an additional basis, based on the Ruben record, why this Court has jurisdiction on Appeal to review the Judgment of the California Supreme Court in case L. A. 25113.

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*Justice Black issued his order in response to a petition by Appellant Kirshbaum filed by telegram with this Court July 10, 1959. In this telegram appellant set forth that Julius Ruben, the Plaintiff in *Ruben v. City of Los Angeles*, on May 12, 1959, filed in the California Supreme Court a Notice of Appeal to this Court from the Judgment of the California Court in case L. A. 25113; that Kirshbaum, a party in interest had also filed a Notice of Appeal from the same Judgment; that Ruben, on July 9, 1959, filed with the California Supreme Court, without notice to Kirshbaum, a Stipulation to dismiss his Appeal to this Court which Stipulation was concurred in by the adverse parties to the case; and that Kirshbaum, relying on the Notice of Appeal by Ruben and on Ruben to prosecute on Appeal the questions presented therein, had not raised certain Constitutional questions in his (Kirshbaum's) Statement of Jurisdiction docketed with this Court as Case 1041, October 1958 term, and thereafter re-numbered Case 155, October 1959 term. Concurrently with the this second Statement of Jurisdiction, Appellant Kirshbaum is filing a formal Petition with this Court to file same.

Opinions Below.

The Opinion of the California Supreme Court in case L. A. 25113, *City of Los Angeles v. Superior Court of Los Angeles County*, from which this Appeal is taken, is reported in 333 P. 2d 245. A copy of the Opinion is attached hereto as Appendix A. The unpublished Opinion of the Superior Court of Los Angeles County in *Ruben v. City of Los Angeles*, case 687,210, in which the questions presented on Appeal herein were first raised, is attached hereto as Appendix B.

The single Opinion of the California Supreme Court in case L. A. 25238, *Ruben v. City of Los Angeles*, Superior Court case 687,210 on Appeal by the City, *and* case L. A. 25239, *Kirshbaum v. City of Los Angeles*, Superior Court case 699,077 on Appeal, is reported in 51 A. C. 861, and is appended to the Statement of Jurisdiction of Appellant Kirshbaum in case L. A. 25239, *Kirshbaum v. City of Los Angeles*, docketed with this Court as case 279, October 1959 term. This Opinion is not *directly* involved in this Appeal (as explained herein under the heading "Jurisdiction") and for this reason reference only is made to it.

Jurisdiction.

1. This is an appeal from a Judgment of the California Supreme Court entered January 13, 1959, in case L. A. 25113, *City of Los Angeles v. Superior Court of Los Angeles County*, granting a Peremptory Writ of Prohibition and declaring Los Angeles City Ordinance 110,204 to be *valid*. Ruben, who was named a real party in interest in this case and responded therein, had previously obtained a judgment in the Los Angeles Superior

Court, *Ruben v. City of Los Angeles*, case 687210, declaring said Ordinance 110204 *invalid*.* (Superior Court Opinion attached hereto as Appendix B.) The City appealed this decision in case 687210 direct to the California Supreme Court (case L. A. 25238), and the Court in a Judgment entered April 21, 1959, declared the questions presented by Ruben in case L. A. 25238 "were resolved" by the previous decision of the Court in the Prohibition case, L. A. 25113. (Par. 4, Sec. 4, of the Court's Opinion in L. A. 25238, appended to Kirshbaum's Statement of Jurisdiction, *Kirshbaum v. City of Los Angeles*, docketed in this Court as case 279, October 1959 term.) This Appeal is therefor taken from the Judgment of the California Supreme Court in case L. A. 25113.

The questions raised herein relate solely to that portion of the California Supreme Court's Judgment in case L. A. 25113 declaring said Ordinance 110,204, to be *valid*. The right of the California Supreme Court to take Jurisdiction and grant a Peremptory Writ of Prohibition in the case has been raised by Appellant Kirshbaum in his original appeal to this Court, now numbered case 155, October 1959 term.

A Petition for a Rehearing in case L. A. 25113 was duly filed by Ruben and denied by the Court on February 11, 1959. Notice of Appeal to this Court was filed by Ruben with the California Supreme Court on May 12, 1959. On July 13, 1959, the Honorable Hugo L. Black, Associate Justice of this Court, granted an extension of

*In a companion case, Superior Court No. 699077, *Kirshbaum v. City of Los Angeles*, combined for trial with the Ruben case, Kirshbaum had also obtained a Judgment declaring said Ordinance 110204 *invalid*. The California Supreme Court (case L. A. 25239) reversed the judgment, and Kirshbaum filed an Appeal with this Court on August 5, 1959, case 279, October 1959 term.

time to and including August 10, 1959, within which to file an Appeal to this Court in Ruben v. City of Los Angeles.

2. The jurisdiction of this Court on Appeal in this cause is conferred by 28 U. S. C. A., Sec. 1257(2).

Cases Believed to Sustain Jurisdiction.

The cases believed to sustain the Jurisdiction of the Supreme Court of the United States are:

(a) A municipal Ordinance is a "state statute" within the meaning of 28 U. S. C. A. Sec. 1257(2).

Staub v. City of Baxter, 78 S. Ct. 277;

Atchison v. Public Utilities, 346 U. S. 346, 349.

(b) Where a state (or municipal) act is alleged to violate the due process clause of the Fourteenth Amendment in that it provides for the expenditure of tax funds and ultimately the taking of property by taxation for a private purpose as distinguished from a public purpose.

The classic *Fallbrook Irrigation District v. Bradley*, 164 U. S. 112, is often cited as the ruling case under which this Court early stated:

We do not assume that . . . decisions of the state court are conclusive and binding upon this Court as to what is due process of the law and as incident thereto, what is a public use . . . these are questions which also arise under the Federal Constitution, and we must decide them in accordance with our views of Constitutional law" (p. 159).

Jones v. City of Portland, 245 U. S. 217, is another often cited case. At page 221: "The ultimate authority to determine the validity of legislation under the Fourteenth Amendment is rested in this Court."

The cases in which this Court has reviewed a state act to determine whether or not it is for a public purpose are innumerable:

Loan Association v. Topeka, 87 U. S. (20 Wall.) 655;

Osborne v. County of Adams, 106 U. S. 181;

Cole v. Grange, 113 U. S. 1;

Ottoway v. Kearey, 108 U. S. 110;

Parkersburg v. Brown, 106 U. S. 487.

One of the clearest and most recent pronouncements of this doctrine that ultimately it is for this Court to determine whether or not a state act is for a public or a private purpose, is in *United States ex rel. Tenn. Valley Authority v. Welch*, at 327 U. S. 546 (1945):

> "This Court has never deviated from the view that under the Constitution a claim that a taking is not for a private use is open for judicial decision ultimately by this Court."

Statute Involved.

A copy of Los Angeles City Ordinance No. 110,204, the "state statute" at issue herein, is attached hereto as Appendix C.

The following is a summary of the pertinent terms of the contract between the City of Los Angeles and the Brooklyn National League Baseball Club, Inc., authorized by and set forth in the Ordinance:

> Whereas, City owns certain land known as Chavez Ravine; and "is in the process of acquiring additional property in said area;"

Whereas, this property "is no longer required for the use of the City;"

Whereas, bringing major league baseball to Los Angeles "would result in direct and indirect benefits to the City;"

Whereas, placing said property on the tax rolls "would produce substantial additional property tax revenues to the City;"

Whereas, City would receive "tax revenues from sources, other than the Ball Club, incident to major league baseball;"

Whereas, Ball Club is willing to construct a major league baseball stadium;

Whereas, Ball Club admits juveniles to various games free of charge "as a method of combating juvenile delinquency;"

Whereas, Ball Club will construct recreational facilities costing "not to exceed" $500,000 on 40 acres of the property, and will spend $60,000 a year maintaining these facilities for 20 years; said facilities "to be mutually agreed upon" and under control of City, but "during any event at said baseball stadium Ball Club shall have the right to use any facilities suitable for parking" within said 40-acre recreational area.

Whereas, such recreational facilities are needed by City;

Whereas, the City is in need of a place for holding various events;

Whereas, "Ball Club is able to have the baseball stadium and grounds known as Wrigley Field conveyed to City;"

Whereas, Wrigley Field "would be of great value to the City";

Whereas, "Ball Club is willing to cause Wrigley Field to be conveyed to the City for said property now owned and to be acquired as aforesaid by the City in Chavez Ravine;"

Whereas, "the bringing of said Major League Baseball Club to Los Angeles would result in a large additional payroll in this area"; and

Whereas, "all of the foregoing . . . is in the public interest,"

It Is Understood and Agreed:

1. City shall deed to Ball Club 315* acres of land, of which the City owns 185 acres. City shall "use its best efforts to acquire, at a reasonable cost, and convey . . . to Ball Club, or nominee" the balance.

1(a) and (b). City reserves mineral (oil) rights in said 315 acres and receives (par. 5 below) mineral rights in Wrigley Field, with provision one-half of all revenue received by City from these mineral rights shall be "expended solely . . . to promote the Youth program of Ball Club" in a manner to be agreed upon between the City Council and Ball Club. City also reserves 5-acre drill site.

(c) City retains title to 40-acre recreational site for 20 years to insure Ball Club provides and maintains recreational facilities, but location of site to be determined by Ball Club; also, any violation by Ball

*The Contract provided in the Ordinance states "300 acres more or less". By Stipulation all parties have agreed the actual total is 315.86 acres. (See Appendix, p. 29, Kirshbaum's original Statement of Jurisdiction in case 155.)

Club in providing recreational facilities shall not affect transfer by City to Ball Club of remaining acreage.

(d) All property to be conveyed by City to Ball Club free of any deed restriction on use. City "agrees to use its best efforts" to have "eliminated or modified" the restriction "to be used for public purposes only" in the deed to the City of a portion (169 acres*) of the property city now owns. If City is unable to accomplish this, the contract "shall be of no further force or effect."

2. City agrees to vacate streets in the property which "would no longer be needed," and "upon demand of Ball Club commence proceedings to vacate said streets." Streets vacated shall be conveyed to Ball Club without further consideration.

3. City shall spend up to $2,000,000 to place the property "in a proper condition". The "manner in which such money will be spent for such purpose to be designated by Ball Club."

4. The City shall provide public streets within the property, but the cost "other than the cost of acquiring necessary land" shall be considered part of the $2,000.000.

5. "Ball Club shall cause to be conveyed to City . . . Wrigley Field."

6. Ball Club shall construct "a modern baseball stadium seating not less than 50,000 people."

7. Ball Club shall move Dodgers to Los Angeles.

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*Stipulated. See Page 29, Kirshbaum original Statement of Jurisdiction filed with this Court in this case.

City agrees to "initiate proceedings" to re-zone the property conveyed to Ball Club to C-3* and for granting a conditional use for a baseball stadium.

The contract is made in reliance upon a resolution by the Los Angeles County Board of Supervisors to "make available" $2,740,000 for access roads.

(NOTE: These last paragraphs are not numbered in the contract.)

Questions Presented.

The following questions are presented by this appeal:

1. Whether the contract contained in and authorized by Ordinance No. 110204 adopted by the City Council of Los Angeles, California, is for a private purpose as distinguished from a public purpose and provides for the expenditure of public funds and property, acquired by taxation, in violation of the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

2. Whether each or any of the following provisions of said contract provide for the expenditure for a private purpose of public money raised by taxation in violation of the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States:

a. That one-half of all monies and proceeds from certain mineral rights of the City shall be expended solely for the purpose of providing and maintaining recreational facilities "to promote the youth program of Ball Club", a private corporation.

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*Commercial-3—in effect the most liberal commercial zoning the City grants. Permits department stores, multi-story apartment and office buildings, hotels, etc. See excerpts from Los Angeles City zoning ordinance, Clerk's Transcript Ruben case 687210.

b. That City shall spend up to $2,000,000 on certain property "to place such property in condition to convey to Ball Club", the manner in which such money shall be spent to be designated by the Ball Club,

c. That the City will use its best efforts to acquire at a reasonable cost up to 115 or more acres of land and convey same to Ball Club.

3. Whether the provision in the contract obligating the City to vacate and convey up to 38.43 acres of public streets to Ball Club "without further consideration", is a gift or expenditure of public property for a private purpose in violation of the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

4. Whether said contract contained in and authorized by said Ordinance No. 110204 delegates authority to a private corporation over the expenditure of public monies in violation of the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States.

Statement of the Case.

1. The Material Facts.

On October 7, 1957, the Los Angeles City Council, by 10-4 vote, one member absent, enacted Ordinance 110204, authorizing the contract set forth therein between the City of Los Angeles and the Brooklyn National League Baseball Club, Inc. (Appendix C hereto; see also Summary of the Contract, pp. 6 to 10 herein.)

Ruben filed a taxpayer's suit in the Superior Court of Los Angeles County, case 087210, asking the Court to

declare the Ordinance invalid on numerous grounds, and to enjoin any further proceedings under the Ordinance.

Kirshbaum also filed a suit, in Mandamus, (Superior Court No. 699077), challenging the validity of the Ordinance and asking the Court to restrain the Mayor and the City Council from executing the proposed Contract and extinguishing a certain "public purpose" deed restriction as a condition of the Contract. The *Ruben* and *Kirshbaum* suits were later combined for trial.

Within thirty days after publication of the Ordinance, pursuant to the City Charter, a petition bearing 82,121 signatures and demanding that the Ordinance be repealed or submitted to a vote of the people at a referendary election, was filed. The City Clerk certified the petition and the Council ordered the Ordinance placed on the ballot of an election held June 3, 1958. The Ordinance was approved by a vote of 351,683 to 325,898.

Kirshbaum then brought a new proceeding, the Superior Court case 703,023, to restrain the City Council from certifying the election results on the grounds that an election cannot validate an invalid contract. This case (sometimes referred to as the "referendum case") remained pending until after trial of the original Ruben and Kirshbaum suits. These went to trial on June 19, 1959.

After five days of trial and three weeks of consideration, the trial judge declared the Ordinance invalid, and in two separate opinions granted judgment for Ruben and Kirshbaum. (Ruben Opinion, Case 687,210, is attached hereto as Appendix B; Kirshbaum Opinion, Case 699,077, is attached as Appendix B to the Statement of Jurisdiction in *Kirshbaum v. City of Los Angeles*, Case 155, October 1959 term.)

The trial judge in his Opinion in the *Ruben* case stated categorically that paragraphs 1(b) and 5 of the Contract, providing that half of any money from the City's oil rights in the properties involved in the Contract shall be used to promote the Youth Program of the Ball Club "provides for the use of City funds to promote a private enterprise." (Appendix B, p. 17.)

The Court declared the City's "promise to vacate the streets" (Contract, par. 2) upon demand of the Ball Club, is a "consideration" for things the City expects to receive from the Ball Club and "the transaction bears all the indicia of a bargain and sale." (Appendix B, p. 23.)

In the *Kirshbaum* Opinion (incorporated into the *Ruben* Opinion: Opening Statement, *Ruben* Opinion, Appendix B, p. 16), the Court stated:

> "Is it not open to a Court to consider whether or not it is a 'public purpose' when a City agrees to convey to a ball club, or its nominee, 315 acres of land (almost a half-section of land—an area nearly a mile long by a half-mile wide) for use by the ball club 'free and clear of any deed restrictions on use' and without any agreement that the land shall be used for ball club purposes only?"

The Court is of the opinion that it is not such a "public purpose" as justifies the use of public funds to acquire property to be transferred to a private corporation for the operation of a private business." (Kirshbaum J. St. case 155, Appendix B, p. 28.)

The Opinion of the Court continues (Appendix B, p. 31):

> "If the City can use public funds to acquire property for the purpose of conveying it to a ball club for

a ball park, to be operated as a private enterprise, for private profit, then the City may use public funds for the purpose of selling it for use for a private bowling alley, a private golf course, a steel mill, an hotel or any other private purpose."

Following the decision in the *Ruben* and *Kirshbaum* cases, and before the *Kirshbaum* "referendum case" (703023) could be heard, the City petitioned the California Supreme Court for a Writ of Prohibition to restrain the Los Angeles Superior Court from proceeding further in the suit to enjoin the Council from certifying the election results. The City asked the California Supreme Court to determine the Contract to be *valid* and to issue a Peremptory Writ of Prohibition on the grounds that the Superior Court was acting in excess of its jurisdiction, in preventing public officials from executing a *valid* statute.

The California Supreme Court, in spite of the fact that the City and the Ball Club were simultaneously appealing from the Superior Court's decisions in the *Ruben* and *Kirshbaum* cases, and in spite of objections by Kirshbaum, took jurisdiction.* On November 6, 1958, the California Supreme Court held a hearing at which Kirshbaum argued that among other reasons the Court had erroneously assumed jurisdiction, questions of fact, requiring the taking of evidence, would be involved in any adjudication of the Contract. The Court thereupon ordered briefs on whether questions of fact were involved, and at the same time arguing the validity of the Contract.

On January 13, 1959, the California Supreme Court declared the Contract *valid* and granted Prohibition. Later, when the original Ruben (Superior Court Case 687,210)

*The adverse ruling of the Court on Kirshbaum's objections is now on appeal to this Court in case 155, October 1959 term.

and Kirshbaum (699,077) came before the Court on Appeal, the Court ruled that all questions presented by Ruben in 687,210 "were resolved" by the Court when it found the Contract valid in the Prohibition case, L. A. 25113. This appeal, and the first Kirshbaum appeal docketed in this Court as case 155, October term, are therefor taken from the Judgment of the California Supreme Court declaring the Contract valid and citing its reasons therefor, in the Prohibition case, L. A. 25113. In another appeal filed with this Court, Case 259 October 1959 term, Appellant Kirshbaum asks this Court to review the adverse ruling of the California Supreme Court on certain points he raised in Superior Court Case No. 699,077 (L. A. 25239 on Appeal), and which the Court did *not* rule upon in L. A. 25113.

The Opinion of the California Supreme Court in the Prohibition case, declaring the Contract valid, is attached hereto as Appendix A. Perhaps the most pertinent statement of the Court therein is:

> "We must view the Contract as a whole and the fact that some of the provisions may be of benefit only to the Ball Club is immaterial. . . . The transfer of Wrigley Field from the Ball Club to the City and construction by the club on the 40-acre parcel of recreational facilities . . . are obviously for proper public purposes. *In view of these direct benefits it is unnecessary for us to consider whether the City could properly expend public funds for the various indirect benefits . . . such as the bringing to the City of a major league baseball club, the construction by the club of its new stadium, and the return of the Chavez Ravine property to the tax rolls.*" (Appendix A, pp. 8-9; emphasis added.)

2. Raising the Federal Questions.

In *Ruben v. City of Los Angeles*, Los Angeles Superior Court case 687,210, in which Ruben first challenged the validity of the Ordinance as authorizing an illegal contract. Ruben, in an Amendment to his Complaint asked that the Court declare the Ordinance void "in that public land and public money are used to create a private benefit." [Clk. Tr. p. 44, lines 22-23.] Ruben further alleged that under the Contract "public streets were being conveyed for the sole purpose of creating private gain" [Clk. Tr. p. 44, line 32, to p. 45, line 2], and that public park land was being diverted for uses "not essentially public." [Clk. Tr. p. 45, lines 24-30.].

In an Amendment to his Amended Complaint, Ruben in his VIIth cause of action alleged that the City had no authority to acquire land "for the sole purpose of selling or conveying same to a private corporation operated for private profit." [Clk. Tr. p. 82, lines 17-20.] And in a separate cause of action Ruben specifically alleged that the Contract authorizes "a gift of public property" and in this, and in the allegations above cited and other allegations incorporated by reference, was a violation of the due process clause of the Fourteenth Amendment to the United States Constitution, which he quotes to the effect that no "state shall deprive any person of . . . property without due process of law." [Clk. Tr. p. 96, lines 18-27.]

In Questions of Law presented to the Court before trial, Ruben asked the Court to determine:

Whether under the Contract "public lands and monies are being used to induce a private corporation to move to Los Angeles"? And whether "the Contract deprives taxpayers of property without due process of law"? [Clk. Tr. p. 176, Questions 12 and 14.]

Ruben in his oral argument to the Superior Court repeatedly and emphatically urged the Court to recognize that the Contract as a whole and various clauses in it taken alone, patently violate the Fourteenth Amendment by authorizing the expenditure of public money raised by taxation for private purposes:

> "The next point 12 in my opinion *is one of the most important* among a number of key issues that I have raised striking at the illegality on the face of the contract.
>
> "*Here is one that is paramount.* It is an issue raised under the Fourteenth Amendment to the Constitution: Nor shall any state deprive any person of property without due process of law." [Rep. Tr. p. 377, lines 20-26.]
>
> "The application of the Fourteenth Amendment to this particular action is that the spending of public moneys for a private purpose is a taking of the taxpayers' money without due process of law." [Rep. Tr. p. 278, lines 10-13.]

On page 383 of the Reporter's Transcript, line 8, Ruben calls the Fourteenth Amendment *"the basic issue in this case."*

And on page 354, before arguing violation of the Fourteenth Amendment as a principal cause of action in the case, Ruben stresses to the Court: "The whole question hinges on whether or not the ball club is a public or private purpose. . . . If it is a private purpose, it is ineffective under the general rules of law and unconstitutional under the Fourteenth Amendment" [p. 354, lines 10-17].

It seems needless to cite additional instances in which Ruben raised the Fourteenth Amendment in his argument to the Court.

Finally, and conclusive as to the proper raising of the Fourteenth Amendment as a Federal Question in the Superior Court, the trial Judge ruled in his Opinion: "The due process clause of the United States Constitution is not involved in this action."* (Appendix B, p. 24.)

The City, while appealing the Superior Court's decisions in the *Ruben* and *Kirshbaum* cases, sought a Writ of Prohibition and concurrently a determination of the validity of the Contract in the California Supreme Court in the parallel *Kirshbaum* "referendum case" (L. A. 25113; Superior Court case 703,023). Ruben was named a party in interest and demurred on the ground that the California Supreme Court could not properly take jurisdiction. The Court took jurisdiction and ordered briefs on the question of the validity of the contract.

(The Court also accepted a stipulation by all parties that the record of the *Ruben and Kirshbaum* cases (687,210 and 699,077) simultaneously being appealed by the City and the Ball Club, be deemed to be before the Court—see p. 5, Los Angeles Dodger's Motion to Dismiss, case 155, October 1959 term. Appellant submits that this placed before the Supreme Court in the Prohibition proceedings, case L. A. 25113, from the judgment in which this appeal is taken, the federal question of violation of the Four-

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*Obviously Appellant does not agree. It is difficult to reconcile this finding of the Trial Court with the emphatic statements by the Court in both the *Ruben* Opinion and the *Kirshbaum* (case 699,077) Opinion, that the Contract in general and in various of its provisions in themselves provides for the improper expenditure of public money for a private purpose. Appellant believes the Court meant by its ruling to recognize that the California Constitution also contains a due process clause, and in addition specifically prohibits the spending of public funds for private purposes (Art. IV, Sec. 31, California Constitution). But if the Contract violates these provisions of the California Constitution, Appellant respectfully submits it violates the Fourteenth Amendment.

teenth Amendment raised by Ruben at various times (*infra*) during the Superior Court trial of case 687,210.)

Ruben duly filed a brief with the California Supreme Court, identified as "Return of Julius Ruben." Under the heading "Use of Public Funds for a Private Purpose Violates the Fourteenth Amendment of the Constitution of the United States, and Article IV, Section 31, of the Constitution of the State of California" Ruben presented ten pages of exhaustive argument and authorities to the Court: (Ruben Return, pp. 124-134.) Ruben followed this 21 pages arguing in general that "The Ordinance Is for a Private Purpose as Distinguished From a Public Purpose for Which Public Funds May Be Expended." (Ruben Return, pp. 134-155.)

When the Court ruled against Ruben (and Kirshbaum, also a Respondent), Ruben filed a petition for a rehearing. Ruben asked the Court to reconsider its Opinion, and in particular its finding that the Contract was for a public purpose because as part of the transaction the City would receive Wrigley Field and certain recreational facilities. He pointed to the "far-reaching implications" of the Court's decision in this regard. (Pet. Reh., p. 1.) And on pages 38 and 39 Ruben again called the Court's attention to the fact that "The expenditure of public funds and property under this Ordinance violates the Fourteenth Amendment of the Constitution of the United States, in that it deprives taxpayers of the City of Los Angeles of Property of the City of Los Angeles, without due process of law." He emphasized, with particular reference to the Fourteenth Amendment: "The use for private purposes of public funds raised by taxation and property purchased with such funds, is the taking of property from the taxpayers without compensation therefor."

The Federal Questions Are Substantial.

Is the Contract between the City of Los Angeles and the Brooklyn National League Baseball Club, Inc. for a public purpose—to secure for the City 10-acre Wrigley Field and certain indefinite recreational facilities? (As the California Court declares in its decision.)

Or is it for a private purpose—to induce a ball club to move to Los Angeles?

This is the specific question raised by this appeal.

But far more important are the ramifications. The Contract calls for a grant of 315 acres of downtown Los Angeles property to the ball club and an expenditure of unknown millions of dollars raised by taxing the people. If this can be done for a ball club without the restraining hand of this Court being raised, what precedent will it set? What other raids upon the public treasuries and ultimately the taxpayers will it unloose?

Has not Justice Miller, in that early and classic decision, *Loan Association v. Topeka*, 87 U. S. (20 Wall.) 655, 665, stated the inevitable: "If it be said that a benefit results to the local public of a town by establishing manufacturers . . . No line can be drawn in favor of the manufacturer which would not open the coffers of the public treasury to the importunities of two-thirds of the businessmen of the City or town."

That is no less true today. Consider, had the City of Los Angeles sought to induce the motion picture industry, the radio and television industry, Disneyland to locate in Los Angeles by subsidizing them with taxes, by offering each firm in each group a contract similar to that offered the ball club? But if a City can aid a ball club, why not

aid these great entertainment industries that in one day bring more payroll, more taxes, more entertainment, more prestige, more tourists to Los Angeles than any ball club ever will?

Can then, taxes and land be taken from the people for the private gain of a ball club in disregard of the Fourteenth Amendment to the Federal Constitution by labelling the contract for a public purpose. If so, how far under the *guise* of public purpose are the people to be taxed?

In 1954, in *Society for Savings v. Bower*, 349 U. S. 143, 151 this Court well stated: "Where a Federal Right is concerned we are not bound by the characterization given to a state tax by state Courts or legislatures."

And in 1957: in *United States v. City of Detroit*, 355 U. S. 466, 477: "In determining the nature of the tax we are not bound by, not even permitted to look to, labels affixed by the state."

The right to possess property and to be secure in its possession, to know that it cannot be taken without due process of law, and only for a public purpose, is at the foundation of our society. The Fourteenth Amendment stands as a bulwark to the Constitution to specifically protect this right that even before the Fourteenth Amendment was accepted as organic, a cornerstone of Democracy.

It has been well said, that when taxation is used to take the property of one private citizen to give it to another, it ceases to be taxation and becomes plunder.

To quote Justice Miller again: "The power to tax . . . is the strongest, most pervading of all the powers of the government, reaching directly or indirectly to all the classes

of the people." This Court is the ultimate guardian of the rights of all the people, and it is urged that this Court carefully review this state decision, this too enthusiastic attempt to induce a ball club to come to Los Angeles, which if left unchallenged opens wide the way to raids on public treasuries in all the states, cities, towns, and counties of the country.

This is a matter, in these days of an ever-increasing tax burden, of the gravest concern to every taxpayer, every property owner in the land.

Respectfully submitted,

PHILL SILVER,

Attorney for Appellant Louis Kirshbaum.

APPENDIX A.

Opinion of the California Supreme Court.

[L. A. No. 25113. In Bank. Jan. 13, 1959.]

The City of Los Angeles *et al.*, Petitioners, v. The Superior Court of the County of Los Angeles *et al.*, Respondents; Los Angeles Dodgers, Inc. (a Corporation) *et al.*, Real Parties in Interest.

Proceeding in prohibition to restrain the Superior Court of Los Angeles County from enforcing a preliminary injunction or taking further action in a taxpayer's suit to enjoin certification of the result of a referendum election. Writ granted.

Roger Arnebergh, City Attorney, Bourke Jones, Assistant City Attorney, and Weldon L. Weber, Deputy City Attorney for Petitioners.

Harold W. Kennedy, County Counsel, and William E. Lamoreaux, Assistant County Counsel, for Respondent.

Joe Crider, Jr., O'Melveny & Myers and Pierce Works for Real Party in Interest Los Angeles Dodgers, Inc.

Julius Ruben, in pro. per., and Phill Silver for Real Parties in Interest Ruben and Kirshbaum.

GIBSON, *C. J.*—By this proceeding in prohibition the city of Los Angeles seeks to restrain the superior court from enforcing a preliminary injunction or taking further action in a taxpayer's suit to enjoin certification of the result of a referendum election.

The city council adopted an ordinance authorizing execution of a contract between the city and the Brooklyn National League Baseball Club, Inc., which provided, among other things, for the exchange of certain properties and for the ball club to erect a stadium and procure

the transfer from Brooklyn to Los Angeles of the franchise of the major league baseball club known as the "Dodgers." Following the filing of a referendary petition, the city council voted to place the ordinance on the ballot for approval or disapproval by the voters, and at the ensuing election a majority of the voters favored adoption of the ordinance. Thereafter respondent superior court granted a temporary restraining order and a preliminary injunction restraining the city council from declaring the result of the election.

Two prior actions were filed by some of the real parties in interest. One was brought to secure a declaration that the ordinance and contract were invalid and to enjoin any proceedings thereunder (Ruben v. City of Los Angeles, L. A. Superior Court No. 687210); in the other similar relief was sought together with mandamus and prohibition (Kirshbaum v. Housing Authority, L. A. Superior Court No. 699077). Judgments were rendered enjoining the execution of the contract, and appeals therefrom are now pending in this court. In a third action filed by Kirshbaum against the city, a preliminary injunction was issued enjoining certification of the result of the referendum election. (Kirshbaum v. City of Los Angeles, L. A. Superior Court No. 703023.) This proceeding was then brought by the city to prohibit the superior court from enforcing the preliminary injunction or from taking further steps in the third action.

The writ of prohibition is an appropriate remedy to arrest the proceedings of a court when there is not a plain, speedy, and adequate remedy in the ordinary course of the law and when the proceedings of the court are without or in excess of its jurisdiction. (Code Civ. Proc. §§ 1102, 1103.) The absence of another adequate remedy

was determined by this court when we granted an alternative writ. (*Cf.* Atkinson v. Superior Court, 49 Cal. 2d 338, 342 [316 P. 2d 960]; Bowles v. Superior Court, 44 Cal. 2d 574, 582 [283 P. 2d 704].) To permit the issuance of prohibition it is not necessary that there be a lack of jurisdiction over the subject matter or parties in the fundamental sense but only that there be a want or excess of the power of the court as defined by statute or by rules developed and followed under the doctrine of *stare decisis*. (Tide Water Assoc. Oil Co. v. Superior Court, 43 Cal. 2d 815, 821 [279 P. 2d 35]; Abelleira v. District Court of Appeal, 17 Cal. 2d 280, 287 *et seq.* [109 P. 2d 942, 132 A. L. R. 715].)

Subdivision 7 of section 3423 of the Civil Code and the second subdivision 7 of section 526 of the Code of Civil Procedure provide that an injunction cannot be granted to "prevent a legislative act by a municipal corporation." Subdivision 4 of section 3423 of the Civil Code and the second subdivision 4 of section 526 of the Code of Civil Procedure similarly provide that an injunction cannot be granted to "prevent the execution of a public statute by officers of the law for the public benefit." The basis for these statutory provisions is to be found in the doctrine of separation of powers of government into three independent departments. (See Reclamation Dist. No. 1500 v. Superior Court, 171 Cal. 672, 682 [154 P. 845]; Glide v. Superior Court, 147 Cal. 21, 24 *et seq.* [81 P. 225].)

A court acts in excess of its jurisdiction if it attempts to enjoin the enactment or enforcement of a valid public statute or ordinance. (Financial Indem. Co. v. Superior Court, 45 Cal. 2d 395, 402 [289 P. 2d 233]; Santa Clara County v. Superior Court, 33 Cal. 2d 552, 557-559 [203

P. 2d 1]; Reclamation Dist. No. 1500 v. Superior Court, *supra*, 171 Cal. 672, 676, 681-682; Wheeler v. Herbert, 152 Cal. 224, 241 [92 P. 353]; Glide v. Superior Court, 147 Cal. 21, 23 *et seq.* [81 P. 225]; Loftis v. Superior Court, 25 Cal. App. 2d 346, 352 *et seq.* [77 P. 2d 491]; State Board of Equalization v. Superior Court, 5 Cal. App. 2d 374, 378 [42 P. 2d 1076]; *cf.* Moore v. Superior Court, 6 Cal. 2d 421, 424 [57 P. 2d 1314].) Although prohibition should not issue where the propriety of the trial court's action depends upon questions of fact (Brock v. Superior Court, 11 Cal. 2d 682, 687 *et seq.* [81 P. 2d 931]; Agricultural Prorate Com. v. Superior Court, 5 Cal. 2d 550, 586-587 [55 P. 2d 495]), none of the persons attacking the contract has pointed to any evidence which would present a substantial question of fact upon a material issue. It follows that prohibition will lie to test the validity of the ordinance.

The contract, as set forth in Ordinance Number 110,204, provides that the city will convey to the ball club 185 acres, more or less, of land presently owned by it in Chavez Ravine and will use its best efforts to acquire at a reasonable cost and convey additional land to make a total of about 300 acres, reserving, among other things, an oil drilling site not to exceed five acres, the location of the site to be mutually agreed upon by the parties. Title to 40 acres of the 300, to be designated by the ball club, is to be retained by the city for 20 years to assure performance by the ball club of its obligations to provide and maintain certain recreational facilities during that period, after which title is to be conveyed to the club.

The city is to employ its best efforts to have eliminated or modified a deed provision restricting the use of certain property acquired by the city from the Los Angeles Housing Authority, provided that if the city is unable

to have the restriction altered to permit the use contemplated by the ball club, the contract shall be of no further effect. Upon conveyance of the property to the club, existing public streets therein no longer needed for street purposes will be vacated, and the city, upon demand of the ball club, is to commence proceedings to vacate such streets and deliver title to the club. Prior to passage of title to any of the 300 acres, the city is to spend up to but not to exceed $2,000,000, in the manner to be designated by the ball club, to place such property in a proper condition to convey to the ball club. The city also is to perform certain acts with respect to construction of additional streets, rezoning the property, and obtaining funds from the county for access roads.

The ball club agrees to construct on the Chavez Ravine property, at its expense, a modern baseball stadium seating at least 50,000 people. It will move to Los Angeles "the present Brooklyn National League franchise and ball team known as the 'Dodgers.'" Further, the club will convey to the city the land and improvements known as Wrigley Field, reserving the right to use of the field until the stadium is completed, conditioned upon payment of a rental to be mutually agreed upon.

Recreation facilities costing not over $500,000 are to be constructed by the ball club on the 40-acre portion of the Chavez Ravine property referred to above, such facilities to be mutually agreed upon prior to conveyance of the property. The club is to maintain the recreational facilities on the 40-acre parcel at an annual cost of $60,000, and in the event the maintenance does not amount to that much in any year, the club is to pay the city the difference between $60,000 and the actual cost. The ball club is under no obligation to furnish personnel for the opera-

tion of the recreational facilities, and, with certain exceptions, the city is to have control of them.

In addition, the agreement contains a number of recitals of fact and declarations of policy to the general effect that the contract will be beneficial to the city and that the property which the city now owns and is to convey to the ball club is no longer required for the use of the city.

The city reserves all mineral rights in the Chavez Ravine property, and it is to acquire all mineral rights in Wrigley Field. The agreement directs that one-half of the receipts from the mineral rights is to be placed by the city in a special trust fund and expended solely for the purpose of providing and maintaining recreational facilities to promote the youth program of the ball club, the location and type of facilities to be mutually agreed upon by the parties. The ball club has given formal notice to the city that the club has waived and relinquished all rights conferred upon it under these provisions and has assigned to the city all such rights. The provisions being solely for the benefit of the club, it could properly waive them, and there is no longer any reason to treat them as parts of the contract.

The benefits to be received by the city are apparent, and the adequacy of the consideration, which involves the comparative values of the promises of the parties, is a matter which, in the absence of abuse of discretion, rests in the judgment and discretion of the city council. (Cf. Wehrle v. Board of W. & P. Commrs., 211 Cal. 70, 72-73 [293 P. 67]; Nickerson v. County of San Bernardino, 179 Cal. 518, 521 *et seq.* [177 P. 465]; Burns v. American Casualty Co., 127 Cal. App. 2d 198, 206 [273 P. 2d 605].

There is no merit to the argument that the contract lacks mutuality in that there is no absolute obligation requiring the ball club to purchase the 40 acres to be used for recreational purposes or binding it to pay any amount therefor. The contract expressly declares that at the end of the 20-year period during which the ball club is to operate the recreational facilities, title to the 40 acres shall be conveyed to the club "without further consideration" if all the terms of the agreement pertaining to the facilities have been fully performed. The consideration for this conveyance obviously is to be found in the various obligations which must be performed by the ball club whether or not it accepts the 40 acres. The contract likewise is not defective because it provides that a violation of the agreement by the ball club regarding its obligations concerning the recreational facilities will not affect any transfers of land theretofore made. The city is amply protected, in the event of such a default, by the fact that it may continue to retain title to the 40 acres and, in addition, may maintain an action for damages for breach of contract.

The contract is claimed to be void because it contains promises to agree in the future. The general rule is that if an "essential element" of a promise is reversed for the future agreement of both parties, the promise gives rise to no legal obligation until such future agreement is made. (Ablett v. Clauson, 43 Cal. 2d 280, 284-285 [272 P. 2d 753].) The enforceability of a contract containing a promise to agree depends upon the relative importance and the severability of the matter left to the future; it is a question of degree and may be settled by determining whether the indefinite promise is so essential to the bargain that inability to enforce that promise strictly according to its terms would make unfair the enforcement of

the remainder of the agreement. (See 1 Williston on Contracts (3d ed. 1957) §§ 45, pp. 152, 156-158; See also Belcher v. Williams, 151 Cal. App. 2d 615, 620 [311 P. 2d 861].) Where the matters left for future agreement are unessential, each party will be forced to accept a reasonable determination of the unsettled point or if possible the unsettled point may be left unperformed and the remainder of the contract be enforced. (Wilson v. Wilson, 96 Cal. App. 2d 589, 593-595 [216 P. 2d 104]; see 1 Williston on Contracts (3d ed. 1957) § 48, pp. 156-158.)

The contract leaves to the future agreement of the parties the location and size, within 5 acres, of the site to be used for oil drilling, the nature of the recreational facilities to be constructed and maintained for 20 years on the 40-acre parcel, and the rental to be paid to the city in the event the ball club exercises its right to use Wrigley Field prior to completion of the stadium. The reservation of an oil drilling site and the establishment and maintenance of the recreational facilities on the 40-acre parcel are, of course, important features of the contract, but, in our opinion, the uncertainty with respect to the exact location and size of the drilling site and the details with respect to the recreational facilities are matters which should not be treated as rendering the contract void. There is no indication that the city and the ball club are unable to come to an agreement as to them, and, if the parties cannot do so, the court may determine the matters within the test of reasonableness referred to above, in accordance with the general purposes of the contract. Similarly, the court could fix a reasonable rental for Wrigley Field, if this should ever become necessary.

In considering whether the contract made by the city has a proper public purpose, we must view the contract

as a whole, and the fact that some of the provisions may be of benefit only to the baseball club is immaterial, provided the city receives benefits which serve legitimate public purposes (*Cf.* City of Oakland v. Williams, 206 Cal. 315, 319 *et seq.* [274 P. 328]; County of Los Angeles v. La Fuente, 20 Cal. 2d 870, 876-877 [129 P. 2d 378].) The transfer of Wrigley Field from the ball club to the city and the construction by the club on the 40-acre parcel of recreational facilities to be used by the city for 20 years, together with maintenance of the facilities for that period, are obviously for proper public purposes. In view of these direct benefits, it is unnecessary for us to consider whether the city could properly expend public funds for the various indirect benefits which the public will receive under the contract, such as the bringing to the city of a major league baseball club, the construction by the club of its new stadium, and the return of the Chavez Ravine property to the tax rolls.

When the contract is viewed as a whole, there is no actual inconsistency, as argued, between the declaration, on the one hand, that the 185 acres of Chavez Ravine property now owned by the city are no longer required for the use of the city and the recital, on the other hand, that 40 acres of the total of 300 to be conveyed to the club are to be used by the city for needed recreational facilities. The provisions, when read together, may properly be interpreted as meaning that the city has no need for the Chavez Ravine property with the exception of the use of the 40-acre parcel over a 20-year period for the recreational facilities referred to in the contract. As we have seen, the city retains control of and title of that 40-acre parcel for the purpose of obtaining the needed facilities. It is difficult to see anything improper in an agreement by which a city, owning more land than it

needs, conveys some of that land in exchange for the construction and maintenance of needed facilities for use by the city over a 20-year period. It is immaterial that the facilities are to be located on the land which the city thus sells; in fact, under the circumstances involved here, it is of advantage to the city that the facilities are to be so located because this enables the city to retain title for the 20-year period as a means of securing the performance of the promises of the ball club regarding the construction and maintenance of the facilities.

Kirshbaum, in action Number 699077, offered to prove by the testimony of a council member that no steps were taken by the council acting as a body to determine whether the land was no longer required for the use of the city. The offer was rejected by the trial court upon the ground that the minutes of the council are the best evidence until there is a dispute as to their correctness, and our attention has not been called to any portion of the minutes which would support Kirshbaum's assertion or to any evidence that the minutes are incorrect. Moreover, the offered evidence, if admitted, would be insufficient to overcome the declaration in the ordinance that the land to be conveyed by the city was no longer required by the city, since the offer does not show any fraud or abuse of discretion by the council. Likewise insufficient to overcome the declaration are Kirshbaum's offers to prove by the testimony of the general manager of the city's department of recreation and parks that this department was actively seeking and acquiring land to be used for playground and recreational purposes and that the Chavez Ravine property is suitable for such purposes.

In our opinion the city can properly agree that, in return for legitimate benefits which it will receive under the contract, it will use its best efforts to acquire addi-

tional land to convey as part of the consideration to be furnished by it, even though the city is in effect agreeing to purchase land for the purpose of selling it immediately thereafter to a private corporation. If the city had so desired, it clearly could have added to the contract price, in cash, the reasonable value of the additional land which it agreed to use its best efforts to acquire, and there is no essential difference if the city, instead of paying the amount in cash, uses the money to acquire property and then conveys the property as part of the contract consideration. Section 2(11)(1) of the city charter authorizes the city to buy "anything useful or convenient" in connection with the exercise of the city's powers. While a city may not purchase land when no public use or purpose is involved, in the present case the additional land is to be acquired for a proper public purpose, namely, that of furnishing the type of contract consideration which enables the city to enter into a bargain which it deems advantageous. The contract does not require the city to use eminent domain to acquire the additional land, and we need not determine whether that method could be employed for such a purpose. This case does not present the situation of a municipal government which seeks to purchase property for the purpose of making a gift of it to a private enterprise or of otherwise improperly using city funds to aid private persons, because the property which the city is to endeavor to buy, if acquired, will not be given away to anyone but will be used as part of the consideration of a contract entered into for a legitimate public purpose.

It is contended that the city does not have power to sell to a private corporation land held by the city subject to a public purpose restriction imposed by the grantor's deed to the city and that the city has no power to enter

into an agreement with a private corporation obligating the city to extinguish such a restriction. This contention relates to land acquired from the Housing Authority of the City of Los Angeles by a deed containing a restriction reading, in part, "to be used for public purpose only; and not to be used directly or indirectly by the City of Los Angeles, or its grantees, successors in interest, assigns, or any other person or persons whatsoever claiming by, through or under the City of Los Angeles, for a period of 20 years from and after the date hereof, for residential development or residential subdivision." The city, as we have seen, agrees to use its best efforts to have the restriction eliminated or modified to permit the use contemplated by the club, and it is provided that if the city is unable to have the restriction changed, the contract shall be of no further effect.

The grantor did not intend by this provision to prohibit the city from selling the property; the provision contains no such limitation and plainly contemplates the possibility of a sale in that the restriction is made applicable to use of the property by the "grantees" and "assigns" of the city. Under section 393 of the charter, when the city no longer requires the use of property, it may, with certain exceptions not pertinent here, sell the property upon such terms and conditions as the council prescribes by ordinance. In view of the declaration by the council that the city no longer requires the use of the property, the city's promise to use its best efforts to have the deed restriction removed cannot be said to constitute an illegal agreement binding the city council to exercise its judgment in the future. Any possibility that the Housing Authority may have a right to complain of a termination of the public use upon a sale by the city will disappear if

the city is able to obtain the Housing Authority's consent to eliminate the restriction. Similarly, such a consent will obviate any difficulty with respect to the restriction against residential use of the property. Whether or not the Housing Authority has power to execute, and is willing to execute, a release of its rights under the deed restriction is a question which relates to the performance rather than to the validity of the contract and is not before us in this proceeding.

We find no merit to the claim that the city has attempted to make an illegal delegation to a private corporation of the duties of the city council by agreeing that, prior to passage of title, the city shall spend $2,000,000 to place the Chavez Ravine property "in a proper condition to convey to" the ball club, the manner in which the money will be spent for such purpose to be designated by the club. It seems obvious that the city could not be required by the ball club, under this provision, to make any expenditures not in accord with the general purposes of the contract. The city could have paid the money to the club outright, as part of the contract consideration, without retaining any control over the manner or purpose for which the money should be spent, and the arrangement by which the city will keep possession of the money until it is spent and, in addition, retain some control of how it is spent, is an advantage to the city which does not militate against the validity of the contract.

It is contended that the city is illegally agreeing to vacate streets under the provision that the existing public streets in the Chavez Ravine property which will no longer be needed for present or future street purposes will be vacated and the city will, upon demand of the ball club,

commence proceedings to vacate the streets. It is an elementary rule that contracts must be construed, whenever possible, so as to make them valid rather than invalid, and the provision, when read as a whole, may be construed as not imposing on the city any improper obligation. The clear implication is that the agreement will apply only to such streets as the city may subsequently determine to be no longer needed for street purposes. The agreement does not purport to control or govern the exercise of the power to determine what streets may no longer be necessary but to provide that, when the determination is made, the city will commence the required statutory procedure.

It is to the advantage of a city and the public to vacate a street which is no longer needed and thereby relieve the city of the expense and responsibility of maintaining it in proper and safe condition. By this part of the contract the city is merely agreeing to do an act which it should do regardless of contract once it determines that there is no longer a need for a particular street. Cases which declare that agreements to vacate or sell a street are invalid as being attempts to evade the statutory modes of procedure and safeguards or to bind local officials in advance as to the exercise of their judgment in the future, are clearly distinguishable. (See County of San Diego v. California Water etc. Co., 30 Cal. 2d 817, 824 [186 P. 2d 124, 175 A. L. R. 747]; People v. City of Los Angeles, 62 Cal. App. 781 [218 P. 63].)

Ruben asserts, in opposition to the conclusion we have reached with respect to vacation of streets, that we must also consider the paragraph which provides that the city shall spend up to $2,000,000 to place the property in a proper condition to convey to the ball club and that the

manner in which the money is to be spent is to be designated by the club. He urges that this paragraph, when read together with the provision relating to the vacation of streets, has the effect of delegating to the club the power to designate which streets are to be eliminated. The contract, however, does not purport to authorize either the city or the ball club to use any of the $2,000,000 to remove a street where such removal has not been duly authorized in appropriate vacation proceedings. If it should be determined in such a proceeding that a particular street remained necessary for public use as a street, the stadium obviously could not be built at that location, but this possibility does not go to the validity of the contract. At most it might render performance impossible, a matter which is not now before us.

Let the writ issue as prayed.

SHENK, *J.*, CARTER, *J.*, TRAYNOR, *J.*, SCHAUER, *J.*, SPENCE, *J.*, and MCCOMB, *J.*, concurred.

APPENDIX B.

In the Superior Court of the State of California, in and for the County of Los Angeles.

JULIUS RUBEN, et al., Plaintiffs, vs. THE CITY OF LOS ANGELES, a Municipal Corporation, et al., Defendants.

No. 687,210

MEMORANDUM DECISION

PRAEGER, Superior Judge — There is annexed hereto, incorporated herein, and made a part hereof, a copy of the Memorandum Decision in *Kirshbaum v. Housing Authority of the City of Los Angeles*, No. 690,077.

The points raised in this case and decided in the Kirshbaum case will not be repeated in this memorandum.

Hence the court will consider the following points which are enumerated in Plaintiff Ruben's "Questions of Law" annexed to the Pretrial Order filed herein on June 13, 1958.

I

Point 2. Gross inadequacy of consideration.

Also under this heading plaintiff argues that it was an abuse of discretion on the part of the City Council not to have had the property appraised.

However these are matters upon which the minds of reasonable men might differ, and in the absence of a palpable abuse of discretion, matters of judgment, wisdom or policy cannot be interfered with by a court. The evidence shows that these matters were brought to the attention of and considered by the City Council and its determination in this regard is binding on the court.

II

Point 3. "The ordinance provides for dominion and control of public moneys and property by a private corporation . . ."

In plaintiff's Trial Brief, the various points have been dealt with under separate sub-headings.

Subheadings 6 and 7 relating to paragraphs 1(b) and 5 of the contract, which provide that one-half of all moneys received by the City from mineral rights shall be placed in special trust fund and "shall be expended solely for the purpose of providing and maintaining recreational facilities to promote the youth program of the Ball Club. . . ."

It needs no citation or authority to show that this provision is *ultra vires* as it provides for the use of City funds to promote a private enterprise.

The Ball Club has filed a waiver of such use of such funds, but the court is of the opinion that it should consider the contract as it appears in the ordinance.

Subheading 8. The contract provides (paragraph 2.) "Upon conveyance of such property to Ball Club, the existing public streets therein which would no longer be needed for present or future streets purposes will be vacated and the City shall, upon demand of Ball Club, commence proceedings to vacate said streets and deliver any title which may remain in the City without further consideration."

Counsel deals with this subject at length under his Point 6. The court will consider it later.

III

Point 4. This point also seems to involve the agreement on the part of the City to vacate streets, and will be dealt with under Point 6.

IV

POINT 5. Plaintiffs' attack under this point is on the provision in paragraph 1(e) of the contract which provides: "It is understood and agreed that any violation of the terms of this agreement with reference to the recreational facilities shall not invalidate or affect any transfers made pursuant to this agreement."

This means that if the Ball Club defaults in the performance of its agreement with respect to the establishment and maintenance of the recreational facilities the City would have no right to a reversion of any of the property conveyed to the Ball Club, but would have to rely on its right to recover damages from the Ball Club for breach of contract.

This is a matter involving judgment or wisdom and does not show gross abuse of discretion and therefore the decision of the City Council is binding on the court.

V

POINT 6. This point involves the provisions of paragraph 2 of the contract that public streets will be vacated by the City upon demand of the Ball Club, and any title which may remain in the City will be delivered to the Ball Club "without further consideration."

It is plaintiff's contention that such an agreement on the part of the City is *ultra vires* and therefore void.

The City and the Ball Club contend that there is nothing improper in such an agreement; and cite the cases which are now mentioned in support of their contentions.

Beals v. City of Los Angeles, 23 Cal. 2d 281.

People v. City of San Rafael, 95 C.A. 733.

People v. City of Pomona, 88 C.A. 2d 460.

People v. City of Oakland, 96 C.A. 488.

—and certain out of state cases. All of these cases involve a review of the action of a City Council in vacating streets or a portion thereof.

They do not meet plaintiffs' point that a City Council cannot agree in advance to vacate public streets, regardless of public convenience and necessity, as part of a contract with a private corporation so to do.

All of the cited cases show that the action of a City Council in connection with the vacation of streets is subject to judicial review.

But this case does not involve that point.

In support of their contention plaintiff cite: *County of San Diego v. Cal Water, etc., Co.*, 30 Cal. 2d 817.

The case is not factually similar, but the following quotation from it which state the general rules are pertinent to plaintiffs' contention. At page 824 the court states: "Specifically, it has been held that an agreement by local officials to abandon, vacate, or sell a road is void. (Citing cases.). Such contracts have been disapproved not only because they are unauthorized by legislation and would permit evasion of the statutory mode of procedure and safeguards but also, it is said, because they constitute improper attempts by the local officials to bind themselves in advance as to the exercise of their judgment in the future *and further, because the receipt of the agreed consideration might influence their future decision*, which is to be made primarily upon consideration of public necessity for highway purposes." (Citing cases.) — (Emphasis added.)

"A further reason for holding the agreement invalid may be in the fact that, if enforced, it would to some extent result in a delegation of authority to the company to determine when, if at all, the abandonment and relocation

should take place . . . A contract to delegate public authority and discretion to private individuals is, of course, improper."

Plaintiffs also cite *People v. City of Los Angeles*, 18 Cal. App. 781.

This was an action to declare void an ordinance adopted by the City Council of the City of Los Angeles which ordered the vacation of a part of Argyle Avenue.

Famous Players-Lasky Corporation owned all the property fronting on either side of that part of Argyle Avenue which was ordered vacated by the ordinance in question, and petitioned the City to vacate that part of the street.

The City demanded that "before the final ordinance of vacation would be enacted, the petitioner must pay all actual expenses in connection with the closing of the street and in addition thereto must pay into the City treasury the sum of $1,000 'for the street vacated.'"

The trial court found with respect to the passage of the ordinance the "City Council was moved thereto by the payment and receipt — of the aforesaid sum of $1,000 . . ."

The Appellate Court said at page 785: "To put the matter bluntly, on the evidence adduced the finding of the court was to the effect that, without the interest or convenience of the public being considered in any way, the City Council sold a public street — for a consideration of $1,000.'" The court further said at page 786: "It is perfectly apparent that the street would not have been vacated, public interest, or not, if the $1,000 had not been paid. *The transaction bears all the indicia of a bargain and sale.*" (Emphasis added.) "If the payment of the $1,000 was not the entire 'moving cause' for the abandon-

ment of the street, it was at least part and parcel of it . . . According to the evidence and the findings by the court in this case, there was no such thing as the public interest or convenience of the public taken into consideration by the City Council." At page 787 the court says: "As distinguished from the '*motive*' and depending entirely upon the '*purpose*' or the '*result*' of a legislative act, where the intent of the legislative body, as shown by the evidence, was to disregard the public interest or convenience and to confer a benefit upon a private individual or corporate body, the following cases are to the effect that the court has authority to review the matter and determine the validity of the ordinance. (Citing cases.)

At page 789 the court quotes from *Horton v. Williams*, 99 Mich. 433 as follows: "The advantage which the public derives from the discontinuance of a way must arise from the vacation itself, rather than from the use to which the property is put, or from the fact that the City, through a deal with the individual specially interested, is to have an interest in the property acquired by such vacation. A City cannot barter away streets and alleys, nor can it do indirectly, by invoking its power of vacating ways, that it cannot do directly. Streets and alleys are not to be vacated at the instance of individuals interested only in the acquisition of the vacated property, and the exercise of legislative discretion in such matters must, at least upon the face of the record, be free from affirmative evidence that such discretion was involved for individual gain, and its exercise influenced by an offer to divide the property acquired."

The court also quotes from McQuillin on Municipal Corporations at page 790: "There are three rules often declared in the decisions in regard to the purpose and

motive for vacating a street and the power of the courts to investigate the motives or interfere with the discretion of Municipal authorities in regard thereto. The first rule is that a street or alley cannot be vacated for a private use, that is, for the purpose of devoting it to the exclusive use and benefit of a private person or corporation, but it may only be vacated to promote the public welfare. Thus there is no power, it is generally held, to vacate a street or alley on payment of a cash consideration by an abutter."

On the part of the City in that case it was contended that the vacating of the street was "to foster and promote the motion picture industry — and to encourage the maintenance and building up of said industry" and "to maintain said industries in the City of Los Angeles and thereby to enable the City to retain its prestige as the motion picture center of the world, and also for the mutual benefit and advantage of the City and its inhabitants and the said motion picture industries — and thus enable the City not only to hold these establishments as a permanent asset of the City, but benefit the inhabitants of the City in many business ways and at the same time help make the City as great as it is a growing City of industry and commerce."

(This brings to mind the third recital in the contract: "Whereas the bringing of major league baseball to Los Angeles would result in direct and indirect benefits to the City, and would be highly beneficial to the City, to the public, and to its inhabitants to have such property the site of a major league baseball stadium.")

The court held at page 793: "It is essentially a judicial question whether the vacation of a street be for a public or for a private benefit."

The judgment of the lower court holding the ordinance void was affirmed.

The agreement in the case at bar on the part of the city to vacate the streets is part and parcel of the consideration to pass from it to the Ball Club for what the City is to receive from it. The property and the other things which the City is to receive from the Ball Club while not expressed in terms of money is nevertheless consideration for its promise to vacate the streets.

Of the 315 acres to be conveyed by the City to the Ball Club, 38.43 acres are streets and highways. (Stipulation of facts, par. 3.)

"The transaction bears all the indica of a bargain and sale."

The ordinance vacating the streets if passed "upon demand of the Ball Club" and as part of the consideration for the whole transaction, would be void.

The agreement of this City to do this illegal act is *ultra vires*, and an abuse of discretion.

VI

POINT 7. Plaintiff contends that the City cannot sell park property to a private corporation.

The park property involved in this transaction is a part of Elysian Park. There is no evidence in this case with respect to the manner of dedication of Elysian Park for park purposes.

For lack of evidence respecting the manner of dedication the court cannot pass on this question, and deems it unnecessary to the decision in any event.

VII

POINT 8 does not go to the question of the validity of the contract.

VIII

Counsel for plaintiff said he passed Point 9 on account of the stipulation that the 8th recital in the contract is a covenant on the part of the Ball Club.

IX

Points 10 and 11. In these points plaintiff states "An Agreement to agree in the future cannot be enforced and the Agreement is void.

The contract may be uncertain and may be too uncertain to be enforced. However the contract is not therefore absolutely void. The effect is that the contract "can give rise to no legal obligation until such future Agreement." (*Ablett v. Clauson* 43 C 2d 280-284). The parties may mutually agree on the matters not definitely decided.

The contract is not on this account beyond the power of the City to enter into.

If the City is not bound because of the uncertainty, and if the parties do not agree on the matters left for future determination there is no contract. However, it is unnecessary to dwell further on this point on account of the court's decision on more vital matters.

X

The court considers it unnecessary to discuss plaintiffs points 12, 13 and 20 further than to say that the due process clause of the Constitution of the United States is not involved in this action, and that in the court's opinion the provision of the contract for the deposit of money in a special trust fund would not violate the State Constitution. The expenditure of the money for the Youth Program of the Ball Club is another matter which has heretofore been determined.

XI

POINT 14 is mostly a duplication of matters raised in other points. This is true of point 15 and also it embraces matters that were decided in the Kirshbaum Case.

XII

POINTS 16, 17 AND 18. Plaintiff asserts that it is a gross abuse of discretion for the City Council to agree to convey the property to the Ball Club, *or its nominee* without a provision in the contract that the nominee must assume and agree to perform all of the obligations of the Ball Club under the contract.

The City asserts: "Whether the nominee of the Ball Club or the Ball Club performs obligations under the contract is wholly immaterial with regard to the legality of the contract and is purely a policy matter not within the scope of judicial inquiry."

Under the rule as stated in *Nickerson v. San Bernardino*, 179 Cal. 518 the court must uphold the contention of the City. This case holds: "Whether in the exercise of legislative powers, a board act wisely or unwisely is of no concern of the courts." What is meant by this statement is that the courts cannot interfere with decisions of this character made by Municipal boards or councils, in the absence of a showing of gross abuse of discretion.

XIII

POINT 19. Plaintiffs contend that the ordinance is void in that it is made in reliance on a void or unenforceable resolution of the Board of Supervisors.

None of the authorities cited by plaintiffs support their contention that the resolutions adopted by the Board of Supervisors is void.

The court is of the opinion that it cannot pass on the validity of said resolution in this action.

The validity of said resolution can be determined only in an action for that purpose with the Board of Supervisors a party to the action.

For the reasons herein stated, and for the reasons stated in the Memorandum Decision in the Kirshbaum case, which are within the issues of this case, judgment should be and hereby is ordered for plaintiffs as follows:

1. Declaring Ordinance No. 110204, passed by the City Council on October 7, 1957, and approved by the Mayor on October 8, 1957, and the contract contained therein are, and each of them is, invalid;

2. That the City of Los Angeles and the officials thereof including the City Clerk and the Mayor of said City be enjoined from:

(a) Executing that certain proposed contract set forth in said Los Angeles Ordinance No. 110,204, between the City of Los Angeles and the Brooklyn National League Baseball Club, Inc.;

(b) From conveying to the Brooklyn National League Baseball Club, Inc., or its nominee, the land involved and partially described in and contemplated by said contract and ordinance;

(c) From carrying out the provisions of said Ordinance No. 110,204, or the contract therein set forth, or any part thereof.

Counsel for plaintiff is directed to prepare Findings of Fact and Conclusions of Law, in accordance with the foregoing views, and the Judgment.

July 14, 1958.

ARNOLD PRAEGER,
Judge

APPENDIX C.

Los Angeles City Ordinance No. 110,204.

ORDINANCE NO. 110,204

An Ordinance authorizing and approving contract between The City of Los Angeles, a municipal corporation, and the Brooklyn National League Baseball Club, Inc., a New York corporation, and authorizing the execution thereof.

WHEREAS, the contract authorized and approved by this ordinance would be highly beneficial to the City of Los Angeles and the inhabitants and taxpayers thereof and to the public and is useful and convenient in connection with the exercise of the City's rights and powers, all as more particularly set forth in said contract,

NOW, THEREFORE,

THE PEOPLE OF THE CITY OF LOS ANGELES DO ORDAIN AS FOLLOWS:

Section 1. That The City of Los Angeles enter into a contract between The City of Los Angeles, a municipal corporation, and the Brooklyn National League Baseball Club, Inc., a New York corporation, in words and figures substantially as follows:

AGREEMENT

THIS AGREEMENT, made and entered into this ——day of ——————, 1957, by and between THE CITY OF LOS ANGELES, a municipal corporation (hereinafter called City), and the BROOKLYN NATIONAL LEAGUE BASEBALL CLUB, INC., a New York corporation (hereinafter called the Ball Club), WITNESSETH:

WHEREAS, City is the owner of certain property in an area generally known as Chavez Ravine, and is in the process of acquiring additional property in said area; and

WHEREAS, such property is no longer required for the use of the City; and

WHEREAS, the bringing of major league baseball to Los Angeles would result in direct and indirect benefits to the City, and would be highly beneficial to the City, to the public, and to its inhabitants to have such property the site of a major league baseball stadium; and

WHEREAS, the placing of such property on the tax rolls would produce substantial additional property tax revenues to the City; and

WHEREAS, the City would receive substantial tax revenues from sources, other than the Ball Club, incident to major league baseball in Los Angeles; and

WHEREAS, the Ball Club is willing to acquire ball stadium and grounds known as Wrigley Field conveyed to City; and

WHEREAS, said Wrigley Field would be suitable for such purposes and would be of great value to the City and its inhabitants; and

WHEREAS, Ball Club is willing to cause Wrigley Field to be conveyed to the City for said property now owned and to be acquired as aforesaid by the City in Chavez Ravine; and

WHEREAS, the bringing of said Major League Baseball Club to Los Angeles would result in a large additional payroll in this area; and

WHEREAS, all of the foregoing is useful and convenient in connection with the exercise of the City's rights and powers and is in the public interest,

NOW, THEREFORE, IT IS UNDERSTOOD AND AGREED AS FOLLOWS, TO WIT:

1. City will convey the property presently owned by it in Chavez Ravine consisting of 185 acres, more or less, and will use its best efforts to acquire, at a reasonable cost, and convey additional land, to make a total of 300 acres, more or less, all as shown in Exhibit A, to Ball Club, or nominee; provided, however:

(a) City shall reserve all mineral rights which it now owns or may hereafter acquire, and a suitable drill site for the production of oil from said property, the location of such site to be mutually agreed upon by the parties hereto, which location shall not interfere with Ball Club's operations, and not exceed 5 acres in size.

(b) One-half of all monies, payments, royalties, or other consideration received by City from said mineral rights, or any of them, in whole or in part, shall be placed in a special trust fund by City, and such funds shall be expended solely for the purpose of providing and maintaining recreational facilities to promote the youth program of Ball Club, the location and type of such recreational facilities to be mutually agreed upon by the parties hereto, with approval by the City Council by ordinance.

(c) That title to said 40 acres thereof, the location of such 40 acres to be designated by Ball Club, shall be retained by the City for a period of 20 years to assure performance by Ball Club of its policy of providing and maintaining recreational facilities. In the event such policy, and all of the terms of this agreement pertaining to the recreational facilities on said 40 acres, shall have been fully and faithfully performed for a period of 20 years, title of such 40 acres shall be conveyed to the Ball Club, or nominee, forthwith, without further consideration.

the land and improvements now known as Wrigley Field, including all mineral rights; provided, however, that one-half of all monies, payments, royalties, or other consideration received by City from said mineral rights, or any of them, in whole or in part, shall be placed in a special trust fund by City and such funds shall be expended solely for the purpose of providing and maintaining recreational facilities to promote the youth program of Ball Club, the location and type of such recreational facilities to be mutually agreed upon by the parties hereto, with approval by the City Council by ordinance; further provided, that Ball Club reserves the right to the use of said Wrigley Field until the stadium referred to in paragraph 6 shall be completed and ready for use, conditioned upon payment to City of a rental to be mutually agreed upon.

6. Ball Club shall cause to be constructed on property conveyed by City, at Ball Club's cost and expense, a modern baseball stadium, seating not less than 50,000 people.

7. Ball Club will cause to be moved to the City of Los Angeles the present Brooklyn National League Baseball franchise and ball team known as the "DODGERS".

The City of Los Angeles agrees that it will intiate proceedings for the purpose of rezoning said property to "C-3" and for the granting of a conditional use permitting its use for a baseball stadium as herein provided.

It is recognized that the method or means of carrying out the terms and conditions of this contract in detail have not been provided herein in every instance but that the parties hereto will use their best efforts in arriving at mutually acceptable methods of procedure and modes of operation as to such details. Any such action on the part of the City shall be submitted to the City Council for approval.

IT IS EXPRESSLY UNDERSTOOD AND AGREED that this agreement is made in reliance upon the action taken by the Board of Supervisors of the County of Los Angeles in Resolution of said Board of Supervisors adopted and entered in the minutes of said Board on Tuesday, September 17, 1957, a copy of which said resolution is attached hereto, marked Exhibit "B", and made a part hereof, providing for the furnishing of funds to construct necessary access roads, including cost of acquiring any required rights of way, and the City agrees that upon the County's making such funds available to City it will diligently proceed with the construction of such access roads. City agrees that it will make demand as required upon the County of Los Angeles to furnish the funds heretofore or hereafter voted

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OF LOS ANGELES FOR PUBLIC APPROACH ROAD IMPROVEMENTS TO THE CHAVEZ RAVINE AREA AND INSTRUCTING CHIEF ADMINISTRATIVE OFFICER AND ROAD COMMISSIONER RELATING TO FUNDS REQUIRED.

On motion of Supervisor Hahn, duly carried by the following vote, to wit: Ayes: Supervisors Legg, Hahn, Chace, Dorn and Ford; Noes, none, it is ordered that the following resolution be and the same is hereby adopted:

WHEREAS, the Board of Supervisors of the County of Los Angeles believes that Major League Baseball would be a recreational and economic asset to this community; and

WHEREAS, both the City and the County have entered into negotiations with the Brooklyn Dodgers, looking toward the transfer of that Club's franchise from New York to Los Angeles; and

WHEREAS, these negotiations contemplate that a site in the Chavez Ravine area will be made available for the construction by the Brooklyn Ball Club of a modern baseball stadium — with parking facilities for 25,000 cars; and

WHEREAS, the Brooklyn Ball Club is also proposing to develop on the site a regional sports center covering approximately 40 acres, these recreational facilities to be available for free public use; and

WHEREAS, if this total development is accomplished, there will be a major increase in vehicular traffic in the Chavez Ravine area because of the public use of the proposed facilities; and

WHEREAS, traffic engineering studies show that present access streets to the Chavez Ravine site are entirely inadequate to accommodate the public use thereof, as contemplated;

NOW, THEREFORE, BE IT RESOLVED that the County of Los Angeles determines that if the proposed improvements are located in the Chavez Ravine area as contemplated the public necessity and convenience will require approach road improvements to the area, and that such improvements will be of general county interest; and

BE IT FURTHER RESOLVED that if a site in the Chavez Ravine area is made available by the City of Los Angeles for these purposes—and concrete evidence of its contemplated or actual improvement in the manner and for the purposes referred to herein is presented to the County, the County of Los Angeles will make available in the manner provided by law a sum of money not to exceed $2,740,000.00 or as much thereof as is needed, to the City of Los Angeles payable on demand by

WHEREAS, the City would receive substantial tax revenues from sources, other than the Ball Club, incident to major league baseball in Los Angeles; and

WHEREAS, the Ball Club is willing to acquire such property, and would, at its cost and expense, construct a major league baseball stadium for the purpose of providing facilities for the major league baseball club known as the BROOKLYN DODGERS; and

WHEREAS, such Club has a long-standing policy of admitting juveniles to various games free of charge as a method of combating juvenile delinquency and stimulating interest in healthful recreational activities; and

WHEREAS, as part of this policy said Ball Club will construct recreational facilities costing not to exceed a half million dollars on a 40-acre portion of the property to be conveyed by the City, as herein provided, in Chavez Ravine, such recreational facilities to be mutually agreed upon by the parties hereto before such property is conveyed to said Ball Club, such recreational facilities to be construeted simultaneously with the construction of said stadium; and as a further part of said policy Ball Club will maintain such recreational facilities for a period of 20 years, at an annual cost of $60,000, but shall be under no obligation to furnish personnel for the operation thereof; provided, that in the event such maintenance cost in any one year does not amount to $60,000, then as a further part of said Ball Club policy the difference between such maintenance cost and $60,000 shall be paid to City so that it may be used by City for the providing of or maintaining recreational facilities elsewhere in said City.

In this connection, it is understood that such recreational facilities shall be under the control of City; but City shall not permit the scheduling of any event at any of the recreational facilities on said 40 acres which would involve the concentration of a large number of participants or spectators during any time when Ball Club has scheduled an event at said baseball stadium, and that during any event at said baseball stadium Ball Club shall have the right to use any facilities suitable for parking as may be provided within said 40 acres; and

WHEREAS, such additional recreational facilities are sorely needed by the City and will fill a definite public need and will be of great value to the City; and

WHEREAS, the City is also in need of a suitable place for the holding of various events, including but not limited to amateur baseball games and similar activities; and

WHEREAS, Ball Club is able to have the baseties on said 40 acres, shall have been fully and faithfully performed for a period of 20 years, title of such 40 acres shall be conveyed to the Ball Club, or nominee, forthwith, without further consideration.

It is understood and agreed that any violation of the terms of the agreement with reference to the recreational facilities shall not invalidate or affect any transfers of land which may theretofore have been made pursuant to this agreement.

(d) All property herein agreed to be conveyed by City, including said 40 acres, will be conveyed free and clear of any deed restriction on use, and title policy shall be furnished to Ball Club. In this connection, it is expressly understood and agreed that the portion of property described in paragraph 1 now owned by the City and which was acquired by City from the Los Angeles Housing Authority has a deed restriction reading, in part, as follows:

"To be used for public purpose only; and not to be used directly or indirectly by the City of Los Angeles, or its grantees, successors in interest, assigns, or any other person or persons whatsoever claiming by, through or under the City of Los Angeles, for a period of 20 years from and after the date hereof, for residential development or residential subdivision."

City agrees to use its best efforts to have such deed restrictions eliminated or modified so as to permit the use contemplated by Ball Club; provided that in the event City is unable to have such restriction so eliminated or modified, this contract shall be of no further force or effect.

2. Upon conveyance of such property to Ball Club, the existing public streets therein which would no longer be needed for present or future street purposes will be vacated and the City shall, upon demand of Ball Club, commence proceedings to vacate said streets and deliver any title which may remain in the City without further consideration.

3. Prior to passage of title to any of the acreage described in paragraph 1, City shall spend up to but not to exceed $2,000,000 to place such property in a proper condition to convey to Ball Club or its nominee, the manner in which such money will be spent for such purpose to be designated by Ball Club.

4. City agrees to provide such public streets as may be needed within the periphery of the area to be acquired by Ball Club; provided, however, that the cost thereof, other than the cost of acquiring necessary land, shall be considered a part of the $2,000,000 which the City is to spend to prepare the site for sale.

5. Ball Club shall cause to be conveyed to City upon the County's making such funds available to City it will diligently proceed with the construction of such access roads. City agrees that it will make demand as required upon the County of Los Angeles to furnish the funds heretofore or hereafter voted and or appropriated for said access roads.

IN WITNESS WHEREOF, The City of Los Angeles has caused this instrument to be executed in its behalf by its duly authorized officers, and the Ball Club has executed the same by its duly authorized officers and has caused its corporate seal to be hereunto affixed, all on the day and year first hereinabove written.

THE CITY OF LOS ANGELES,

By .....

(SEAL)

ATTEST:

.....

City Clerk

BROOKLYN NATIONAL LEAGUE BASEBALL CLUB, INC.

By .....

President

By .....

Secretary

(SEAL)

EXHIBIT "B"

Gordon T. Nesvig, Chief Clerk of the Board.

COUNTY OF LOS ANGELES BOARD OF SUPERVISORS, 501 HALL OF RECORDS, LOS ANGELES 12.

Members of the Board: John Anson Ford, Chairman; Herbert C. Legg, Kenneth Hahn, Burton W. Chace and Warren M. Dorn.

RESOLUTION

Introduced by Supervisor

Tuesday, September 17, 1957

The Board met in regular session. Present: Supervisors John Anson Ford, Chairman presiding, Herbert C. Legg, Kenneth Hahn, Burton W. Chace and Warren M. Dorn; and Harold J. Ostly, Clerk, by Gordon T. Nesvig, Deputy Clerk.

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IN RE MAJOR LEAGUE BASEBALL IN COUNTY OF LOS ANGELES: RESOLUTION DETERMINING THAT COUNTY OF LOS ANGELES WILL MAKE AVAILABLE $2,740,000.00 TO CITY

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IN WITNESS WHEREOF, The City of Los Angeles has caused this instrument to be executed in its behalf by its duly authorized officers, and the Ball Club has executed the same by its duly authorized officers and has caused its corporate seal to be hereunto affixed, all on the day and year first hereinabove written.

THE CITY OF LOS ANGELES,

By .....

(SEAL)

ATTEST:

.....

City Clerk

BROOKLYN NATIONAL LEAGUE BASEBALL CLUB, INC.

By .....
President

By .....
Secretary

(SEAL)

EXHIBIT "B"

Gordon T. Nesvig, Chief Clerk of the Board.

COUNTY OF LOS ANGELES BOARD OF SUPERVISORS, 501 HALL OF RECORDS, LOS ANGELES 12.

Members of the Board: John Anson Ford, Chairman; Herbert C. Legg, Kenneth Hahn, Burton W. Chace and Warren M. Dorn.

RESOLUTION

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The Board met in regular session. Present: Supervisors John Anson Ford, Chairman presiding, Herbert C. Legg, Kenneth Hahn, Burton W. Chace and Warren M. Dorn; and Harold J. Ostly, Clerk, by Gordon T. Nesvig, Deputy Clerk.

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IN RE MAJOR LEAGUE BASEBALL IN COUNTY OF LOS ANGELES: RESOLUTION DETERMINING THAT COUNTY OF LOS ANGELES WILL MAKE AVAILABLE $2,740,000.00 TO CITY

County of Los Angeles will make available in the manner provided by law a sum of money not to exceed $2,740,000.00 or as much thereof as is needed, to the City of Los Angeles payable on demand by the City, for public approach road improvements to the Chavez Ravine area; and

BE IT FURTHER RESOLVED that the Board of Supervisors hereby instruct the Chief Administrative Officer and the Road Commissioner to include within the Road Department 1958-59 budget (Motor Vehicle Fund) for the purposes recited herein an appropriation in an amount estimated to be required for expenditure in 1958-59, and in subsequent years as required, appropriations representing the balance required out of the total commitment of $2,740,000.00, provided that such balance be further reduced by any funds which may be advanced during the current fiscal year by action of the Board of Supervisors.

I hereby certify that the foregoing is a full, true and correct copy of a resolution which was adopted by the Board of Supervisors of the County of Los Angeles, State of California, on September 17, 1957, and entered in the minutes of said Board.

HAROLD J. OSTLY, County Clerk of the County of Los Angeles, State of California, and ex officio Clerk of the Board of Supervisors of said County.

By s VIRGINIA MULLENDORE
Deputy Clerk

(SEAL)

Sec. 2. That the Mayor of The City of Los Angeles and the City Clerk be, and they are hereby, authorized and directed to, respectively, execute and attest said contract substantially as set forth in Section 1 hereof for and on behalf of The City of Los Angeles.

Sec. 3. The City Clerk shall certify to the passage of this ordinance and cause the same to be published in some daily newspaper printed and published in the City of Los Angeles.

I hereby certify that the foregoing ordinance was introduced at the meeting of the Council of the City of Los Angeles of September 30, 1957, and was passed at its meeting of October 7, 1957.

WALTER C. PETERSON,
City Clerk.
By A. M. Morris, Deputy.

Approved October 8, 1957.
NORRIS POULSON,
Mayor.

File No. 78067

EXHIBIT "A"

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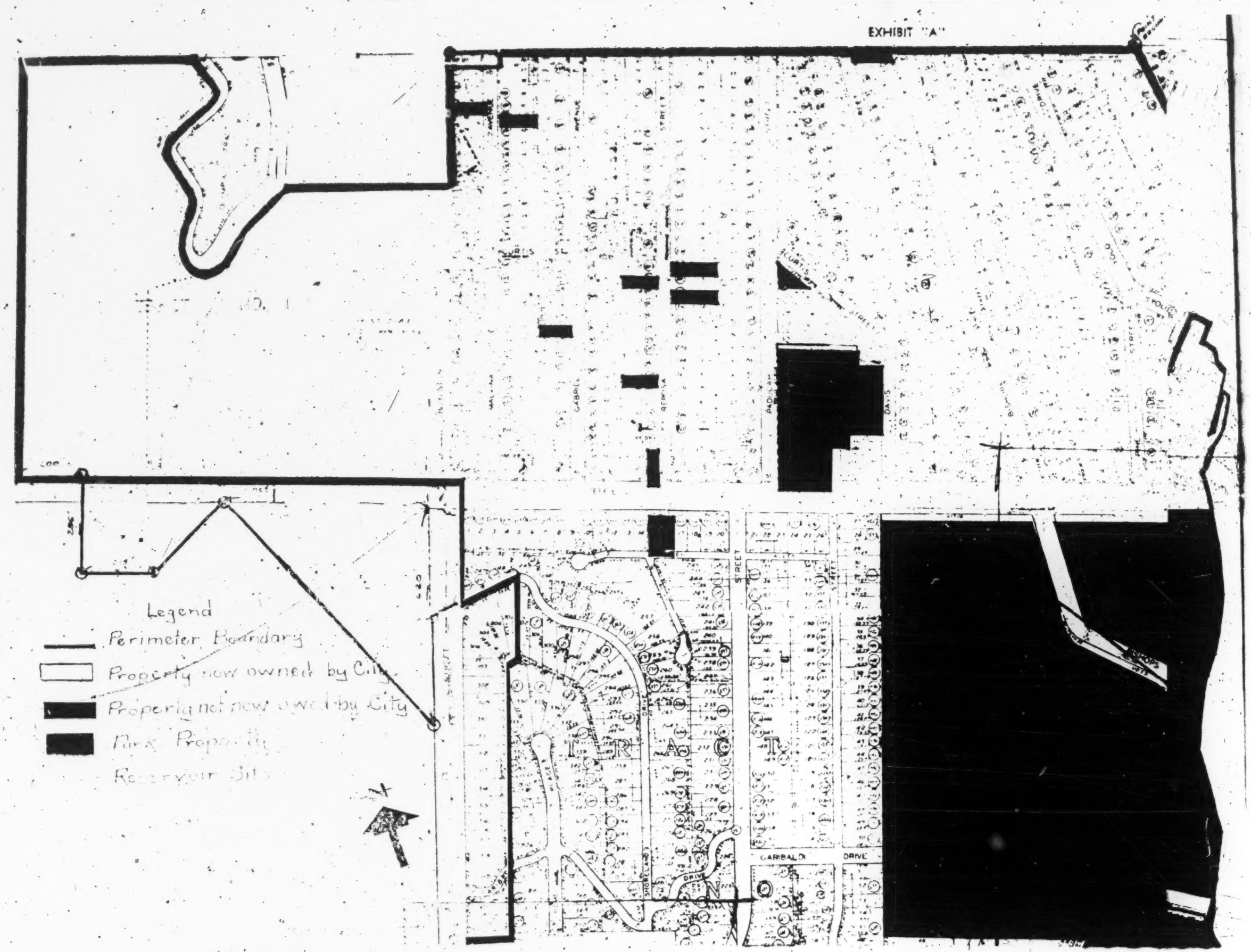
EXHIBIT "A"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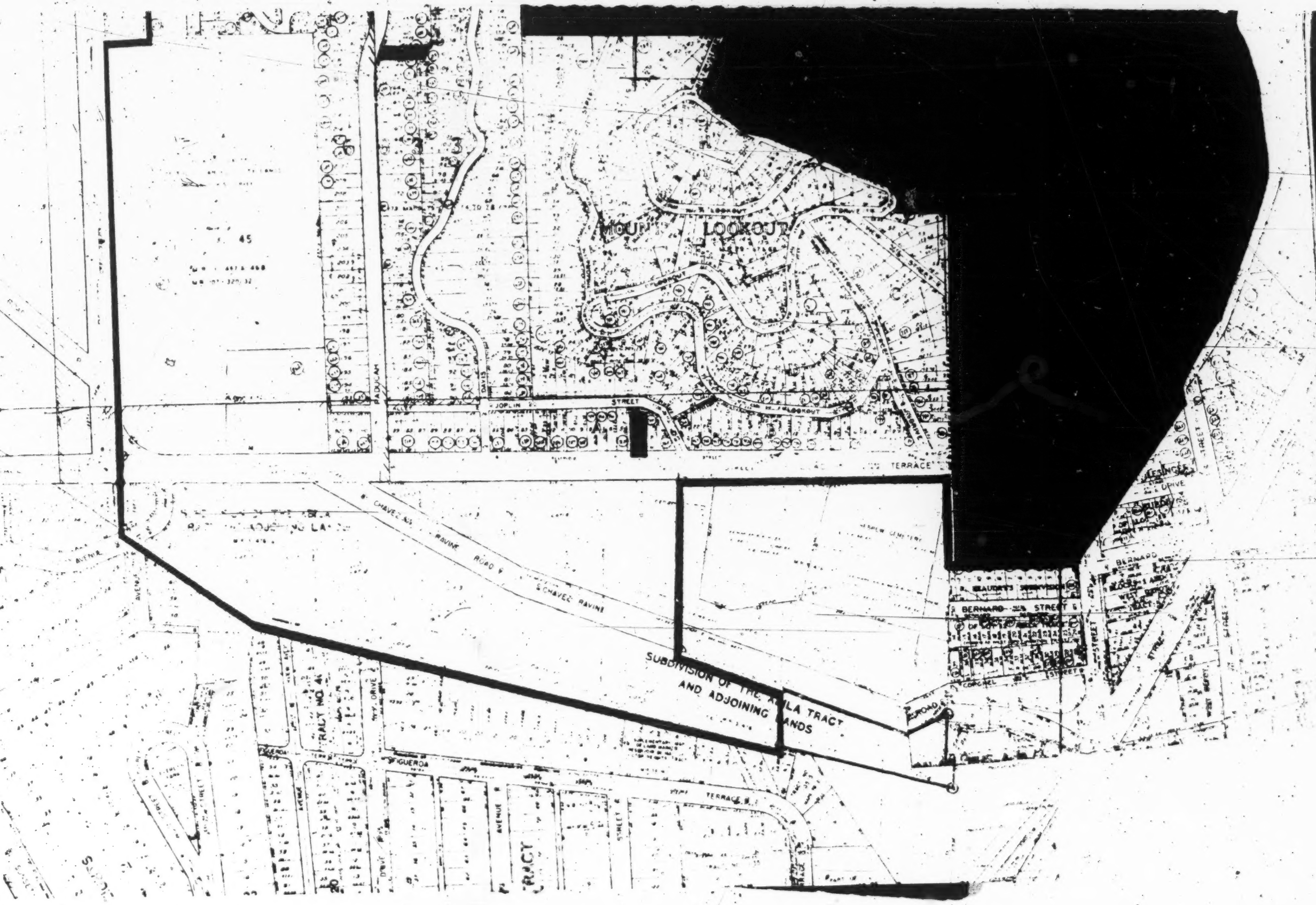
Perimeter Boundary
Property now owned by City
Property not now owned by City
Park Property
Reservoir Site
GABRIEL
REPOSA
DAVIS
STREET
DRIVE
GARIBALDI
SHORELAND
TERRACE
TROOPS


MOUNT
LOOKOUT
STREET
TERRACE
CHAVEZ RAVINE
SUBDIVISION OF THE ARELLA TRACT
AND ADJOINING LANDS
BERNARD STREET
TRACT

IN THE

SUPREME COURT OF THE UNITED STATES

JULIUS RUBEN, Appellant

vs.

CITY OF LOS ANGELES, et al

No. ___

MOTION TO INTERVENE

AS AN APPELLANT

LOUIS KIRSHBAUM,
Applicant for Intervention

On July 11, 1959, Counsel for Louis Kirshbaum submitted by telegram to this Court a Petition asking permission for Kirshbaum to file a Statement of Jurisdiction pursuant to a Notice of Appeal filed by Appellant Ruben in this action. This Notice of Appeal was filed in the Supreme Court of the State of California on May 12, 1959. Thereafter, on July 10, 1959, Ruben filed with the California Court a Stipulation seeking to dismiss said Notice of Appeal.

On July 13, 1959, Honorable Hugo L. Black, Associate Justice of this Court, issued an order granting Kirshbaum to and including August 10, 1959, in which to file an Appeal (The Statement of Jurisdiction to which this is attached).

In conformance with the order of Justice Black, and for the reasons set forth in said telegraphed Petition, Louis Kirshbaum herewith respectfully moves for leave to intervene as an Appellant in the above entitled case, in order to assert the grounds set

California Court a Stipulation seeking to dismiss said Notice of Appeal.

On July 13, 1959, Honorable Hugo L. Black, Associate Justice of this Court, issued an order granting Kirshbaum to and including August 10, 1959, in which to file an Appeal (The Statement of Jurisdiction to which this is attached).

In conformance with the order of Justice Black, and for the reasons set forth in said telegraphed Petition, Louis Kirshbaum herewith respectfully moves for leave to intervene as an Appellant in the above entitled case, in order to assert the grounds set forth in the attached Statement of Jurisdiction, and any other grounds which Ruben might be entitled to assert.

This Petition is filed pursuant to paragraph 2 of Rule 24 of the Federal Rules of Civil Procedure permitting intervention in an action "when the representation of the Applicant's interest by existing parties is or may be inadequate and the Applicant may be bound by a judgment in the action."

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Attorney for Applicant
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Hollywood 28, Calif.

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FILE COPY

Office-Supreme Court, U.S.
FILED
AUG 21 1959
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959.

No. 291

JULIUS RUBEN,

Appellant,

vs.

THE CITY OF LOS ANGELES, including members of City Council, City Clerk and Mayor,

LOS ANGELES DODGERS,

Appellees.

Brief of Appellees the City of Los Angeles and the Council Thereof in Opposition to Motion of Louis Kirshbaum to Intervene as Appellant.

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SUBJECT INDEX

PAGE

Foreword 1

Statement of the case 1

Argument 5

I.

No appeal may be had where not taken within the statutory time allowed therefor 5

II.

Parties cannot be added on appeal who were not parties to the cause in the court below 7

Conclusion 8

TABLE OF AUTHORITIES CITED

CASES

	PAGE
Hartford Accident & Indemnity Co. v. Bunn, 288 U. S. 169	5
The City of Los Angeles, et al. v. The Superior Court of the County of Los Angeles et al.; Los Angeles Dodgers, Inc. (a Corporation), et al., Real Parties in Interest, 51 A. C. 425	1, 2
The Steamer William Bagley v. United States, 72 U. S. 377	7

STATUTES

Federal Rules of Civil Procedure, Rule 1	6
Federal Rules of Civil Procedure, Rule 24, par. 2	6
Federal Rules of Civil Procedure, Rule 81	6
Los Angeles Municipal Ordinance No. 110,204	2
United States Code, Title 28, Sec. 2101(c)	5

RULES

California Supreme Court Rules, Rule 14, Subd. 1	4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959.

No. 291

JULIUS RUBEN,

Appellant,

vs.

THE CITY OF LOS ANGELES, including members of City Council, City Clerk and Mayor,

LOS ANGELES DODGERS,

Appellees.

Brief of Appellees the City of Los Angeles and the Council Thereof in Opposition to Motion of Louis Kirshbaum to Intervene as Appellant.

Foreword.

The motion of Louis Kirshbaum is "for leave to intervene as an appellant in the above entitled cause." The above-entitled cause involves the same judgment of the California Supreme Court as that involved in *Kirshbaum v. The City of Los Angeles, etc., et al.*, Appellees, No. 155, October Term 1959.

Statement of the Case.

The judgment of the California Supreme Court involved is that entitled in said court, *The City of Los Angeles, et al.*, Petitioners v. *The Superior Court of the County of Los Angeles, et al.*, Respondents; *Los Angeles Dodgers, Inc. (a Corporation) et al., Real Parties in Interest,* re-

ported in 51 Adv. Cal. 425, and attached as Appendix A to the statement of jurisdiction filed by appellant Louis Kirshbaum in No. 155 and as Appendix A to the statement of jurisdiction filed by the same appellant in the instant case, No. 291.

The judgment of the California Supreme Court is the result of an original proceeding brought in that court by The City of Los Angeles and the Council thereof, as petitioners, to prohibit the Superior Court in and for the County of Los Angeles from proceeding further with the case of *Kirshbaum v. City of Los Angeles*, No. 703,023, which was another suit brought by Kirshbaum seeking to determine by declaratory relief the validity of the referendum election held on Ordinance No. 110,204, authorizing the contract between The City of Los Angeles and the Los Angeles Dodgers, Inc., and in which the Superior Court issued an order for a preliminary injunction against certifying the results of the election. (Pet. for Prohibition, par. IX, pp. 9-11.) It was alleged in the Petition for Writ of Prohibition, at page 13, as follows:

"XI.

"That the real parties in interest herein are (1) Louis Kirshbaum, Julius Ruben, Therese Steffy, and all other citizens resident in The City of Los Angeles who are assessed for and are liable to pay, or have paid a tax in The City of Los Angeles within one year of the commencement of said action in the Superior Court entitled, Louis Kirshbaum, as a taxpayer of the City of Los Angeles, Plaintiff, vs. The City of Los Angeles, et al., Defendants, No. 703,023; and (2) The Brooklyn National League Baseball Club, Inc., a corporation, now known as the Los Angeles Dodgers, Inc., a corporation."

Julius Ruben filed a demurrer to the above petition, which recites (p. 2, lines 18-20):

> "Comes now, Julius Ruben, herein named as a party in interest, for himself alone, and demurs to the petition herein, upon the following grounds:"

Julius Ruben also filed in the California Supreme Court a document entitled, "Return of Julius Ruben and Harry Leary, Executor of The Estate of Therese Steffy Named Herein As Real Parties In Interest, By Way of Answer and Brief." The "answer" portion of the document is headed, (p. 1) "Answer of Julius Ruben and Harry Leary, Executor, Named As Parties In Interest." The petition for rehearing filed by Julius Ruben is designated as, "Petition Of Julius Ruben For Rehearing Of The Decision Of The Supreme Court" and concludes with (p. 31):

"Respectfully submitted,

Julius Ruben,

Attorney Pro per."

The "Notice of Appeal to The Supreme Court of The United States, by Julius Ruben" states, at pages 1 and 2 thereof, "Notice is hereby given that Julius Ruben, the appellant above named, one of the real parties in interest, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of California that a writ of prohibition issue, which judgment was entered in this action on January 13, 1959." The notice of appeal is signed: "Julius Ruben, Attorney Pro Per."

The "Stipulation To Dismiss Appeal To The Supreme Court Of The United States" filed in the California Supreme Court, as provided for in Rule 14, Subd. 1, is as follows:

> "On motion of JULIUS RUBEN, appellant, pro per, it is hereby stipulated and agreed by and between said appellant and the appellees, THE CITY OF LOS ANGELES, a municipal corporation and the COUNCIL OF THE CITY OF LOS ANGELES as the petitioners in said cause, and the LOS ANGELES DODGERS, INC., a corporation, one of the real parties in interest, that the notice of appeal and the appeal herein of said JULIUS RUBEN be dismissed, without costs."

From the foregoing it is obvious that Julius Ruben did not appear in the subject action on behalf of anyone but himself and, at most, the executor of the estate of Therese Steffy. He most certainly did not appear on behalf of taxpayers as a class, as he did in the action which he originated in the Superior Court. That is the case referred to in the telegram to the Justices of this Honorable Court sent by Phill Silver under date of July 10, 1959, wherein it is stated: "The original Ruben case which resulted in his being named a party in interest in this case, was a representative taxpayers suit * * *." The case which Ruben instituted in the Superior Court went to the California Supreme Court on appeal where the judgment of the Superior Court was reversed with directions (51 A. C. at p. 868) and the case is now closed.

Argument.

The order made by Mr. Justice Black on July 13, 1959, that "the time for filing any appeal appellant may be legally entitled to file in the above entitled cause be, and the same is hereby, extended to and including August 10, 1959" affords no basis for the motion of Louis Kirshbaum to intervene as an appellant in this cause, for the reason that the only party taking a timely appeal under the statute was Julius Ruben for himself alone and it is now too late for any other party to be permitted to become an appellant.

I.

No Appeal May Be Had Where Not Taken Within the Statutory Time Allowed Therefor.

The judgment of the California Supreme Court involved was rendered on January 13, 1959. Timely petitions for rehearing in that court were filed and denied, thus adding 30 days to the date of finality of the judgment. The judgment thus became final on February 12, 1959. Under Title 28 U. S. C. Section 2101(c) the time for appeal expired 90 days thereafter, or, on May 13, 1959. If another party were to be allowed to become an appellant after such date as is requested by Louis Kirshbaum, then it would be contrary to the statute.

The situation presented in the case at bar is governed by the decision in *Hartford Accident & Indemnity Co. v. Bunn*, 288 U. S. 169, wherein it is said at pages 177 and 178:

> "* * * If this application and the accompanying motion to amend were granted, the practical effect

would be to permit an appeal by a party to a judgment after the prescribed time had expired.

"The statute (Act of Feb. 13, 1925, chap. 229, sec. 8, 43 Stat. at L. 940, U. S. C. title 28, sec. 350) provides—'No writ of error, appeal, or writ of certiorari, intended to bring any judgment or decree before the Supreme Court for review shall be allowed or entertained unless application therefor be duly made within three months after the entry of such judgment or decree, . . .' Passage of the three months' period extinguished the right to grant an appeal. Rust Land & Lumber Co. v. Jackson, 250 U. S. 71, 76, 63 L. ed. 850, 852, 39 S. Ct. 424; Toledo Scale Co. v. Computing Scale Co., 261 U. S. 399, 418, 67 L. ed. 719, 727, 43 S. Ct. 458."

It may be mentioned in passing that the citation of paragraph 2 of Rule 24 of the Federal Rules of Civil Procedure permitting intervention, upon which the motion is based, is of no help to the moving party as Rule 1 states, "These rules govern the procedure in the district courts of the United States in all suits of a civil nature whether cognizable as cases at law or in equity with the exceptions stated in Rule 81. * * *" The rules obviously do not apply to appeals to the United States Supreme Court from decisions of the highest State courts, and nothing in Rule 81 purports to do so.

II.

Parties Cannot Be Added on Appeal Who Were Not Parties to the Cause in the Court Below.

In *The Steamer William Bagley v. United States*, 72 U. S. 377, it was held at page 412:

"Appellees are always heard in support of the decree, but they cannot have any greater damages than were assessed in the court of subordinate jurisdiction. Interveners here, however, are neither appellants nor appellees, as they did not appear as claimants in the district court, and were not in any way made parties to the litigation. Original jurisdiction in prize, as well as in all other admiralty causes, is vested exclusively in the district courts. Property captured, where appeals are allowed to the circuit court, follows the cause into that court, but it does not in any case follow the cause into this court, because this court has no original jurisdiction in such cases. *The Collector*, 6 Wheat. 194; *Jennings v. Carson*, 4 Cranch, 28.

"Evidently the application, in this case, is in its nature original, and not appellate, and it is well settled that this court has no original jurisdiction in prize causes. *The Harrison*, 1 Wheat. 298; *Marbury v. Madison*, 1 Cranch, 173. Such an application cannot be first presented in this court and allowed, because it would be assuming jurisdiction not granted either by the Constitution or the laws of Congress.

"*Petition of intervention is dismissed, and the decree of the District Court affirmed.*"

Thus since Julius Ruben appeared in the action below solely on his own behalf and for the executor of the estate of Therese Steffy, a stranger to that appearance cannot now be allowed to intervene in this Court and carry on an appeal which he, Ruben, took and dismissed.

Conclusion.

In conclusion it is respectfully submitted that the motion of Louis Kirshbaum to intervene in the above-entitled cause should be denied.

Respectfully submitted,

ROGER ARNEBERGH,
City Attorney,

BOURKE JONES,
Assistant City Attorney,

WELDON L. WEBER,
Deputy City Attorney,

Attorneys for Appellees, The City of Los Angeles, Mayor, City Clerk and Council Thereof.

FILE COPY

FILED
AUG 21 1959
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

October Term, 1959

No. 291

JULIUS RUBEN,

Appellant,

vs.

THE CITY OF LOS ANGELES, a Municipal corporation, THE CITY COUNCIL OF THE CITY OF LOS ANGELES, LOS ANGELES DODGERS, INC., and THE HOUSING AUTHORITY OF THE CITY OF LOS ANGELES,

Appellees.

On Appeal From the Supreme Court of the State of California.

OPPOSITION OF LOS ANGELES DODGERS, INC., TO MOTION OF KIRSHBAUM TO INTERVENE,

and

MOTION TO DISMISS APPEAL.

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SUBJECT INDEX

PAGE

Opposition of Los Angeles Dodgers, Inc., to motion of Kirshbaum to intervene, and motion to dismiss appeal 1
Opposition to motion to intervene 2

Motion to dismiss 3

Opinions below 3

Jurisdiction 3

Question presented 3

Statement 4

Argument 5

I. The appeal is not within the jurisdiction of the court 5

II. The federal question sought to be raised by applicant is unsubstantial 6

Conclusion 9

Appendix—Stipulation to dismiss appeal to the Supreme Court of the United States ..... App. p. 1

TABLE OF AUTHORITIES CITED

CASES

	PAGE
Beals v. City of Los Angeles, 23 Cal. 2d 381	7
Carmichael v. Southern Coal Co., 301 U. S. 495	7
City of Los Angeles v. Superior Court, 51 Cal. 2d 423	2
County of Los Angeles v. Dodge, 51 Cal. 492	7
County of Los Angeles v. Dodge, 51 Cal. App. 498	7
Davis v. City of Santa Ana, 108 Cal. App. 2d 669	7
Everson v. Board of Education, 330 U. S. 1	8
Kirshbaum v. City of Los Angeles, Cal. 2d 857	3, 5
Nickerson v. County of San Bernardino, 179 Cal. 518	7
Wehrle v. Board of Water & Power Commissioners, 211 Cal. 70	7

STATUTES

California Statutes of 1931, p. 2626	5
California Statutes of 1935, p. 2360	5
California Statutes of 1949, p. 3124	5
Los Angeles City Charter, Sec. 281	5
Los Angeles City Charter, Sec. 385	5
Los Angeles City Charter, Sec. 390	5
United States Code, Title 28, Sec. 1257(2)	2
United States Code, Title 28, Sec. 2103	9
United States Judicial Code, Sec. 1257(2)	3, 5

RULES

United States Supreme Court Rules, Rule 14, subd. 1	1, 2, 5

IN THE

Supreme Court of the United States

October Term, 1959

No. 291

JULIUS RUBEN,

Appellant,

vs.

THE CITY OF LOS ANGELES, a Municipal corporation, THE CITY COUNCIL OF THE CITY OF LOS ANGELES, LOS ANGELES DODGERS, INC., and THE HOUSING AUTHORITY OF THE CITY OF LOS ANGELES,

Appellees.

On Appeal From the Supreme Court of the State of California.

OPPOSITION OF LOS ANGELES DODGERS, INC., TO MOTION OF KIRSHBAUM TO INTERVENE, and MOTION TO DISMISS APPEAL.

Appellee Los Angeles Dodgers, Inc., respectfully opposes the motion of applicant Kirshbaum to intervene in this appeal, and moves that the appeal be dismissed on the grounds that (1) the appeal is not within the jurisdiction of this Court, because not taken in conformity to the rules of this Court in that said appeal, prior to the docketing thereof, was dismissed by the appellant (Ruben) in conformity with Subdivision 1 of Rule 14 of this Court, and (2) the appeal presents no substantial federal question.

Opposition to Motion to Intervene

Appellant Ruben and applicant Kirshbaum (appellant in No. 155) heretofore each noticed an appeal to this Court from the judgment of the Supreme Court of California in the case of City of *Los Angeles v. Superior Court*, L. A. No. 25113, officially reported at 51 Cal. 2d 423. Thereafter, prior to docketing of this appeal in this Court, there was filed in the Supreme Court of California a stipulation duly executed by appellant Ruben and respective counsel for appellees the City of Los Angeles, the Council of the City of Los Angeles, and Los Angeles Dodgers, Inc., stating "that the notice of appeal and the appeal herein of said *Julius Ruben* be dismissed, without costs." A copy of such stipulation is annexed as an appendix hereto.

The effect of the filing of the stipulation in question was to dismiss the appeal. Rule 14(1) of the Rules of this Court. Since the appeal is no longer pending, it follows that Kirshbaum's attempt to intervene therein must necessarily fail. Accordingly, it is respectfully urged that the motion of Kirshbaum to intervene in this (Ruben) case should be denied, without prejudice, of course, to Kirshbaum's right to sustain, if he can, his own appeal in No. 155.

Respectfully submitted

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August, 1959.

MOTION TO DISMISS

Opinions Below

The opinion in the Supreme Court of California in this case (J. S. App. 1)* is reported in 51 Cal. 2d 423. The opinion in the Supreme Court of California in the related cases of *Ruben v. City of Los Angeles* and *Kirshbaum v. City of Los Angeles* is reported in 51 Cal. 2d 857. The opinion of the Los Angeles Superior Court in the related case of *Ruben v. City of Los Angeles* (J. S. App. 16) is not reported.

Jurisdiction.

The judgment of the Supreme Court of California was filed on January 13, 1959, and appellant's petition for rehearing was denied without opinion on February 11, 1959. (Clk. Tr. v. I).** Notice of appeal to this Court was filed on May 12, 1959 (Clk. Tr. v. I). Appellant Ruben filed a stipulation dismissing his appeal, prior to any docketing thereof, on July 9, 1959 (appendix hereto). The jurisdiction of this Court is sought to be invoked under §1257(2) of the Judicial Code (28 U. S. C. 1257(2)).

Question Presented

The City of Los Angeles and Los Angeles Dodgers, Inc., negotiated a contract under which the City is to convey to the Dodgers certain property for use as a baseball stadium site, and the Dodgers are to convey to the City certain other real property and to construct and maintain certain public recreational facilities. As required

---

*Throughout this Motion, references to pages of the Jurisdictional Statement are made as follows: "J.S.....," and to pages of the appendix thereof as follows: "J.S.App. ....."

**Throughout this Motion, references to the volumes of the transcript of the record, as prepared by the Clerk of the court below, are made as follows: "Clk. Tr. v. ....."

by the City Charter, the contract was embodied in a municipal ordinance which the City Council and Mayor approved. Subsequently, the ordinance was approved by a majority of the voters at a referendary election.

Applicant for Intervention Kirshbaum thereupon brought a taxpayer's suit in the Superior Court of Los Angeles County seeking to enjoin the certification of the referendary election upon the ground that the proposed contract as embodied in the ordinance would be invalid. The Superior Court granted a preliminary injunction. The City then commenced the instant case as an original action in the Supreme Court of California seeking a writ of prohibition to restrain the Superior Court from enforcing its preliminary injunction or from taking any further steps in the injunction suit. Kirshbaum, Ruben, and appellee Los Angeles Dodgers, Inc. were joined in said proceeding as real parties in interest. The Supreme Court of California ordered the issuance of a peremptory writ of prohibition as prayed for, holding, *inter alia*, that the proposed contract was for a public purpose and was in all respects valid.

In these circumstances, the question presented here is whether the court below was correct in holding that the contract between the City and the Dodgers is for a public purpose.*

Statement

The Court's attention is respectfully invited to the full statement of the facts contained in the Motion of Los Angeles Dodgers, Inc. to Dismiss in No. 155 of this Term (at pp. 4-8 thereof).

---

*Appellant's argument as to substantiality is addressed solely to this question. We therefore will not trespass upon the Court's time by discussing the subordinate questions enumerated by him at J.S. 10-11, all of which are shown to be wholly unsubstantial by the opinion of the Supreme Court of California, J.S.App. 1; 51 Cal. 2d 423.

ARGUMENT

The Statement as to Jurisdiction asks this Court to review a decision of the California Supreme Court upholding the validity of a contract between the City of Los Angeles and the Los Angeles Dodgers, Inc.* The only real question involved below was the validity of the contract *under state law*, and on this point the Supreme Court of California approved the contract emphatically, unanimously, and not once but twice.** Thus, although the baseball stadium referred to in the contract is naturally a matter of interest to the sports world, the local controversy over the validity of the contract does not present any important or recurrent question of federal law. Moreover, the Supreme Court of California was clearly correct in its holding that the subject contract was for a public purpose.

I. The Appeal Is Not Within the Jurisdiction of the Court

As pointed out in the foregoing opposition to Kirshbaum's motion to intervene, this appeal was dismissed by stipulation of the appellant Ruben and of the parties appellee prior to docketing in this Court. (Rule 14(1) of the Rules of this Court.) It follows that no case nor controversy is present, and accordingly, appellee respectfully suggests that the Court now lacks jurisdiction to hear and determine the matter.

---

*Only because the contract required authorization by an ordinance passed by the City Council is there any possible basis for an appeal under Section 1257(2) of the Judicial Code. See Los Angeles City Charter §300, 1935 Cal. Stat. 2360; and see Los Angeles City Charter §§281 and 385, 1931 Cal. Stat. 2626 and 1949 Cal. Stat. 3124, respectively.

**See, in addition to the opinion below, the opinion in Ruben v. *City of Los Angeles*, and *Kirshbaum v. Housing Authority*, 51 Cal. 2d 857. This latter opinion is printed as an appendix to the Motion of Los Angeles Dodgers, Inc. to Dismiss in No. 155 of this Term.

II. The Federal Question Sought to Be Raised by Applicant Is Unsubstantial

Applicant asserts that the City-Dodger contract is for a private and not a public purpose. From this premise he argues that, as a municipal taxpayer, his rights under the Fourteenth Amendment will be infringed as the result of the proposed use of tax moneys for a private purpose.

The Court below held that the proposed contract, viewed in proper perspective and as a whole, is for a *public* purpose:

> "In considering whether the contract made by the city has a proper public purpose, we must view the contract as a whole, and the fact that some of the provisions may be of benefit only to the baseball club is immaterial, provided the city receives benefits which serve legitimate public purposes (Cf. City of Oakland v. Williams, 206 Cal. 315, 319 *et seq.* [274 P. 328]; County of Los Angeles v. La Fuente, 20 Cal. 2d 870, 876, 877 [129 P. 2d 378].) The transfer of Wrigley Field from the ball club to the city and the construction by the club on the 40-acre parcel of recreational facilities to be used by the city for 20 years, together with maintenance of the facilities for that period, are obviously for proper public purposes. In view of these direct benefits, it is unnecessary for us to consider whether the city could properly expend public funds for the various indirect benefits which the public will receive under the contract, such as the bringing to the city of a major league baseball club, the construction by the club of its new stadium, and the return of the Chavez Ravine property to the tax rolls." (J. S. App. 8-9.)

This holding is an application of the general principle of municipal law that, in the absence of collusion or fraud, legislative determinations by a city council are *conclusive* as to whether a given act is in the public interest or serves the public convenience, necessity or benefit. *Beals v. City of Los Angeles*, 23 Cal. 2d 381, 385-386 (1943) (street vacation); *Wehrle v. Board of Water & Power Commissioners*, 211 Cal. 70, 73 (1930) (land acquisition); *Nickerson v. County of San Bernardino*, 179 Cal. 518, 521 (1918) (hospital site acquisition); *County of Los Angeles v. Dodge*, 51 Cal. App. 492, 498 (1921) (contract and lease, Los Angeles Coliseum); *Davis v. City of Santa Ana*, 108 Cal. App. 2d 669, 679 (1952) (municipal contract). As said in *County of Los Angeles v. Dodge*, 51 Cal. App. at p. 498:

> "When the legislature, or a board of supervisors or city council engaged in the exercise of legislative functions, proceeds upon the assumption that a matter concerning which it acts is one affecting the public interest or designed to promote the general welfare, the assumption is conclusive upon the courts unless it is plainly apparent to them that the view entertained by the legislative body is without just foundation."

The foregoing principle is wholly in accord with repeated decisions of this Court. Thus, this Court has emphasized that "the requirements of due process leave free scope for the exercise of a wide legislative discretion in determining what expenditurgs will serve the public interest" (*Carmichael v. Southern Coal Co.*, 301 U. S. 495, 514); that the question whether an "expenditure serves a public purpose is a practical question addressed to the law-making department, and would require a plain case

of departure from every public purpose which could reasonably be conceived to justify the intervention of a court" (*Id.*, at 515); and that the authority of this Court to strike down "state statutes on the ground that the purpose for which tax-raised funds were to be expended was not a public one" is one which is "exercised with the most extreme caution" (*Everson v. Board of Education*, 330 U. S. 1, 6).

The ordinance and the proposed contract (J. S. App. following p. 27) contain the following legislative findings of the City Council, all of which stand unimpeached:

1. The Chavez Ravine property is no longer required for the use of the City and the placing of such property on the tax rolls would produce substantial additional tax revenues to the City.

2. The City would receive substantial tax revenues from sources, other than the ball club, incident to major league baseball in Los Angeles.

3. The Dodgers are willing to construct the new stadium, and, in aid of its policy of combating juvenile delinquency, will construct and maintain for twenty years mutually agreed upon recreational facilities on the forty-acre parcel, which recreational facilities in question are sorely needed and are to cost not more than $500,000.

4. The City is in need of a suitable place such as Wrigley Field for the holding of various events such as amateur baseball and the like; that Wrigley Field would be suitable for such purposes and would be of great value to the City and its inhabitants.

5. The bringing of major league baseball to Los Angeles would result in large additional payroll to this area.

Reflecting these findings, the Council concluded that the contract was in the public interest. In these circumstances, it is clear that the Supreme Court of California correctly held that the Council action was for a public purpose. Accordingly, the federal question here attempted to be raised by applicant must necessarily fail for want of substance.

Conclusion.

For the foregoing reasons, Appellee Los Angeles Dodgers, Inc. urges that the appeal herein should be dismissed. If the papers whereon the appeal was taken are to be treated as a petition for certiorari pursuant to 28 U. S. C. Section 2103, certiorari should be denied.

Respectfully submitted,

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Attorneys for Los Angeles Dodgers, Inc.

August, 1959.

APPENDIX

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MAdison 6-8083

Attorney for Appellant in pro per

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE CITY OF LOS ANGELES, a municipal corporation, and THE COUNCIL OF THE CITY OF LOS ANGELES,

Petitioners (and Appellees),

vs.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF LOS ANGELES,

Respondent,

JULIUS RUBEN, One of the Real Parties in Interest,

Respondent (and Appellant),

LOUIS KIRSHBAUM, One of the Real Parties in Interest,

Respondent,

LOS ANGELES DODGERS, INC., a corporation, One of the Real Parties in Interest,

Respondent.

L. A. Civil No. 25113

STIPULATION TO DISMISS APPEAL TO THE SUPREME COURT OF THE UNITED STATES

On motion of JULIUS RUBEN, appellant, pro per, it is hereby stipulated and agreed by and between said appellant and the appellees, THE CITY OF LOS ANGELES, a municipal corporation and the COUNCIL OF THE CITY OF LOS ANGELES as the petitioners in said cause, and the Los An-

GELES DODGERS, INC., a corporation, one of the real parties in interest, that the notice of appeal and the appeal herein of said JULIUS RUBEN be dismissed, without costs.

Julius Ruben

.....

JULIUS RUBEN
Appellant
O'MELVENY & MYERS
By William W. Alsup

.....

O'MELVENY & MYERS and JOE CRIDER, JR.
Attorneys for Los Angeles Dodgers, Inc., Appellee

.....

ROGER ARNEBERGH,
City Attorney
Attorney for City of Los Angeles and Council of City of Los Angeles, Appellees.
BOURKE JONES, as
Assistant City Atty.

ILE COPY

Supreme Court, U.S.
FILED
AUG 21 1959
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

October Term, 1959.
No. 291

JULIUS RUBEN,

Appellant,

vs.

THE CITY OF LOS ANGELES, including members of City Council, City Clerk, and Mayor,

LOS ANGELES DODGERS, INC.,

Appellees.

MOTION OF THE CITY OF LOS ANGELES, MAYOR, CITY CLERK AND COUNCIL THEREOF TO DISMISS.

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SUBJECT INDEX

PAGE

Argument 2

The questions presented relate solely to interpretation of Ordinance No. 110,204 contrary to that adopted by the California Supreme Court 2

The United States Supreme Court will be guided by the interpretation of the ordinance adopted by the California Supreme Court 8

The judgment rests on an adequate non-federal basis 10

Conclusion 11

TABLE OF AUTHORITIES CITED

CASES	PAGE
City of Los Angeles v. Superior Court of Los Angeles County, 51 A. C. 425	2
Cook County v. Calumet & Chicago Canal Co., 138 U. S. 635	10
Loan Association v. Topeka, 87 U. S. 655	8
Lynch v. New York ex rel. Pierson, 293 U. S. 52	10
Society for Savings v. Bowes, 349 U. S. 143	9
United States v. City of Detroit, 355 U. S. 466	9
STATUTE	
Los Angeles Municipal Ordinance No. 110,204	2, 9

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Appellees.

MOTION OF THE CITY OF LOS ANGELES, MAYOR, CITY CLERK AND COUNCIL THEREOF TO DISMISS.

The City of Los Angeles, a municipal corporation, and the Mayor, City Clerk and Council thereof, petitioners below and appellees herein, respectfully move that the appeal of Julius Ruben in this cause be dismissed under Rule 16, subsection 1, paragraph (b) upon each of the following grounds:

1. The appeal does not present a substantial federal question;
2. The judgment rests on an adequate non-federal basis.

ARGUMENT.

Appellant Kirshbaum has filed in this case what amounts to a second jurisdictional statement in No. 155 based on what he claims "is to disclose an additional basis, based on the Ruben record, why this Court has jurisdiction on appeal to review the judgment of the California Supreme Court in case L.A. 25113." This is the judgment appealed from by Kirshbaum, entitled, *City of Los Angeles v. Superior Court of Los Angeles County* in the court below, reported in 51 Adv. Cal. 425, and is in No. 155, October Term 1959.

The Questions Presented Relate Solely to Interpretation of Ordinance No. 110,204 Contrary to That Adopted by the California Supreme Court.

This second jurisdictional statement of Kirshbaum is addressed to the proposition, according to the "Questions Presented" on page 10 thereof, that Ordinance No. 110,204 "is for a private purpose as distinguished from a public purpose and provides for the expenditure of public funds and property, acquired by taxation in violation of the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States." Additionally the same question is directed to three specific provisions of the contract authorized by Ordinance No. 110,204.

The first specific provision, referred to as "a." page 10 of the jurisdictional statement relative to the expenditure of one-half of the monies that might be received from mineral rights, has been eliminated from the case by the relinquishment, waiver and assignment to the City

of rights under this provision by the Appellee Los Angeles Dodgers, Inc., as appears from the decision of the California Supreme Court as reported in 51 Adv. Cal. at page 434, it being there stated:

> "* * * The ball club has given formal notice to the city that the club has waived and relinquished all rights conferred upon it under these provisions and has assigned to the city all such rights. The provisions being solely for the benefit of the club, it could properly waive them, and there is no longer any reason to treat them as parts of the contract."

The second specific reference, designated "b," at page 11 of the jurisdictional statement, refers to the expenditure of up to $2,000,000 to place the property to be conveyed to the ball club in condition to convey, the manner in which such expenditure is to be made to be designated by the ball club. As to this provision the California Supreme Court stated, 51 Adv. Cal. at pages 438 and 439:

> "We find no merit to the claim that the city has attempted to make an illegal delegation to a private corporation of the duties of the city council by agreeing that, prior to passage of title, the city shall spend $2,000,000 to place the Chavez Ravine property 'in a proper condition to convey to' the ball club, the manner in which the money will be spent for such purpose to be designated by the club. It seems obvious that the city could not be required by the ball club, under this provision, to make any expenditures not in accord with the general purposes of the contract. The city could have paid the money to the club outright, as part of the contract consideration, without

retaining any control over the manner or purpose for which the money should be spent, and the arrangement by which the city will keep possession of the money until it is spent and, in addition, retain some control of how it is spent, is an advantage to the city which does not militate against the validity of the contract."

The third specification on the same page of the jurisdictional statement designated "c." refers to the undertaking of the City to acquire at reasonable cost additional property and convey the same to the ball club. As to this the California Supreme Court stated, at page 437 of 51 Adv. Cal.:

"In our opinion the city can properly agree that, in return for legitimate benefits which it will receive under the contract, it will use its best efforts to acquire additional land to convey as part of the consideration to be furnished by it, even though the city is in effect agreeing to purchase land for the purpose of selling it immediately thereafter to a private corporation. If the city had so desired, it clearly could have added to the contract price, in cash, the reasonable value of the additional land which it agreed to use its best efforts to acquire, and there is no essential difference if the city, instead of paying the amount in cash, uses the money to acquire property and then conveys the property as part of the contract consideration. Section 2(11) (1) of the city charter authorizes the city to buy 'anything useful or convenient' in connection with the exercise of the city's powers. While a city may not purchase land when no public use or purpose is involved, in the present case the additional land is to be acquired for

a proper public purpose, namely, that of furnishing the type of contract consideration which enables the city to enter into a bargain which it deems advantageous. The contract does not require the city to use eminent domain to acquire the additional land, and we need not determine whether the method could be employed for such a purpose. This case does not present the situation of a municipal government which seeks to purchase property for the purpose of making a gift of it to a private enterprise or of otherwise improperly using city funds to aid private persons, because the property which the city is to endeavor to buy, if acquired, will not be given away to anyone but will be used as part of the consideration of a contract entered into for a legitimate public purpose."

At page 11 of the jurisdictional statement the question is posed:

"Whether the provision in the contract obligating the City to vacate and convey up to 38.43 acres of public streets to Ball Club 'without further consideration' is a gift or expenditure of public property for a private purpose in violation of the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States."

This question has no rational basis in the facts of the case. When streets are vacated where the streets exist by virtue of a street easement the owners of the underlying fee, which is usually the owners of the abutting property, take the land with the street easement extinguished, without further conveyance. This is the actual situation in the case at bar. However as a precaution, in the event of vacation where by some peculiar situation

due possibly to some odd type dedication the fee might possibly remain in the City thus creating an island in the otherwise exclusive ownership of the ball club, the City will convey such an island without additional cost. In short, the question posed has no substance in actuality.

The fourth question on page 11 of the jurisdictional statement, "Whether said contract contained in and authorized by said Ordinance No. 110,204 delegates authority to a private corporation over the expenditure of public monies in violation of the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States," is too vague and indefinite to determine if the ordinance as a whole is referred to or some unspecified portion thereof, and seems to be nothing more than repetitious of the first question on page 10.

This second jurisdictional statement in the case is subject to the same fatal defect as the first one in that it is sought to urge upon this Court an interpretation of the ordinance at variance with the logical one adopted by the California Supreme Court after careful analysis. For instance, under the heading "The Federal Questions Are Substantial" on page 20 the question is posed whether the contract is for a public purpose or is it for a private purpose to induce a ball club to move to Los Angeles. Any fair analysis of the ordinance leads to the conclusion that the most that moving any baseball club to Los Angeles could be involved therein is that such contemplated moving furnished the occasion for the City to put in operation the proposed plan whereby the City could get some

practical benefit out of idle land which the City simply did not have the finances to develop, and also acquire a stadium (Wrigley Field) and, for at least 20 years, 40 acres of recreational facilities developed ($500,000) and maintained ($60,000 per year) at the cost of the ball club, which facilities are badly needed to augment the public recreation program of this City.

It is claimed that far more important than the specific question raised on appeal are the ramifications. (Jurisdictional Statement, p. 20.) It is there claimed that, "The Contract calls for a grant of 315 acres of downtown Los Angeles property to the ball club and an expenditure of unknown millions of dollars raised by taxing the people." This is nothing but hysterical yammering.

The property when acquired by the Housing Authority was built up with substandard dwellings, the balance of the property involved is vacant land with the exception of a few odd lots and a school which is no longer usable for housing pupils. The allegation of values in the complaint filed by Ruben is that "the acreage in its present state as raw land, is valued at about $6,000 to $7,000 per acre." [Clk. Tr. *Ruben v. City*, p. 29, lines 13-15.] Can this be "downtown Los Angeles property?" As far as untold millions are concerned, they will not be raised by taxing the people. That kind of money is simply not forthcoming from taxation in this area. The limit of the City's liability is set in the contract, any "untold millions" will have to be forthcoming from some place other than a public agency such as the City or the County.

The United States Supreme Court Will Be Guided by the Interpretation of the Ordinance Adopted by the California Supreme Court.

It was pointed out at pages 19 and 20 of these appellees motion to dismiss addressed to the first jurisdictional statement filed by the appellant Kirshbaum in No. 155 that this Honorable Court will follow the interpretation of the ordinance adopted by the State court and resolve all reasonable doubts in favor of such interpretation. No useful purpose can be served by burdening the Court with repetition of what was there said. Suffice it to say that under the decisions there cited no federal question of substance is presented in this second jurisdictional statement.

Loan Association v. Topeka, 87 U. S. 655 is cited at page 20 of the jurisdictional statement. There is no argument about the rule there laid down as to the necessity for a public purpose; however, that case has no application to the facts of this case. No room for interpretation was there involved, for as stated in the opinion at page 655, "The bonds on their face purported to be payable to the King Wrought Iron Bridge Manufacturing and Iron Works Company, of Topeka, to aid and encourage that company in establishing and operating bridge shops in said City of Topeka, * * *." The case at bar falls within the purview of the role of the Courts, as stated at page 664 of the opinion that:

> "We have established, we think, beyond cavil, that there can be no lawful tax which is not laid for a public purpose. It may not be easy to draw the line in all cases so as to decide what is a public purpose in this sense and what is not.

> "It is undoubtedly the duty of the Legislature which imposes or authorizes municipalities to impose a tax, to see that it is not to be used for purposes of private interest instead of a public use, and the courts can only be justified in interposing when a violation of this principle is clear and the reason for interference cogent."

Society for Savings v. Bowcr, 349 U. S. 143, cited at page 21 of the jurisdictional statement, furnishes no support to appellant's position. In that case this Honorable Court was at pains to analyze the tax statute involved to show the true payer of the tax to be, contrary to any rational basis for what is described at page 151 as "The Court's mere conclusion that the tax is imposed on the depositors is no more than a characterization of the tax."

United States v. City of Detroit, 355 U. S. 466, cited at page 21 of the jurisdictional statement, is not pertinent to the case at bar for the reason, as stated on page 469:

> "* * * Of course in determining whether a tax is actually laid on the United States or its property this Court goes beyond the bare face of the taxing statute to consider all relevant circumstances."

There is no evidence in the case at bar attacking the face of Ordinance No. 110,204 nor was any claim made that the ordinance was not what it purports to be. All arguments advanced as to the purpose of the ordinance were based on the face of the ordinance itself. Thus, the case reduces itself to an interpretation of the ordinance. And, the interpretation thereof by the California Supreme Court being a rational and logical one, the same will be accepted and followed by this Honorable Court in disposing of the case on appeal.

The Judgment Rests on an Adequate Non-Federal Basis.

There having been no evidence introduced or argument made other than that based upon the face of the ordinance that the same was not for a public purpose, it follows that the question resolved itself into a matter of examination and determination from the face of the ordinance the object and purpose thereof. The California Supreme Court rationalized that the ordinance was for a legitimate public purpose. That conclusion does not involve any constitutional question. This is all that the California Supreme Court held in this regard.

When the California Supreme Court arrived at this conclusion upon examination of the face of the ordinance, constitutional questions based upon contrary contentions unsuccessfully urged ceased to be involved in the case.

As stated in *Lynch v. New York ex rel. Pierson*, 293 U. S. 52, 54:

> "It is essential to the jurisdiction of this Court in reviewing a decision of a court of a State that it must appear affirmatively from the record, not only that a federal question was presented for decision to the highest court of the State having jurisdiction but that its decision of the federal question was necessary to the determination of the cause, and that it was actually decided or that the judgment as rendered could not have been given without deciding it. . . ."

And see:

Cook County v. Calumet & Chicago Canal Co., 138 U. S. 635, 651.

Conclusion.

For the reasons stated it is respectfully submitted that the appeal in this cause should be dismissed.

Respectfully submitted,

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Appellees,

LOUIS KIRSHBAUM,

Intervenor.

On Appeal From the Supreme Court of the State of California.

BRIEF IN OPPOSITION TO DODGER'S MOTION TO DISMISS APPEAL.

and

BRIEF IN OPPOSITION TO CITY'S MOTION TO DISMISS APPEAL.

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SUBJECT INDEX

PAGE

Brief in Opposition to Dodger's Motion to Dismiss Appeal 1

Preliminary statement 1

I.

Reply to Ball Club's argument 7

II.

Reply to Ball Club's Point I that the appeal is not within the jurisdiction of the court 8

III.

Reply to Ball Club's Point II that the federal question sought to be raised by applicant is unsubstantial 9

Conclusion 10

Brief in Opposition to City's Motion to Dismiss Appeal 11

I.

Reply to City's argument that the questions presented relate solely to interpretation of Ordinance 110204 contrary to that adopted by the California Supreme Court 13

The waiver of oil rights by the Ball Club 13

The two million dollars to be spent by City in manner designated by Ball Club 14

City's agreement to purchase additional property for the Ball Club 16

City's agreement to vacate streets designated by Ball Club 18

Conclusion to Section I 18

II.

Reply to City's point that the United States Supreme Court will be guided by the interpretation of the ordinance adopted by the California Supreme Court 21

III.

Reply to City's point that the judgment rests on an adequate non-federal basis 23

TABLE OF AUTHORITIES CITED

CASES	PAGE
Barker v. Sherman, 123 Cal. App. 2d 810	14
Broad River Co. v. South Carolina, 281 U. S. 527	23
County of Los Angeles v. Dodge, 51 Cal. App. 498	10
County of Los Angeles v. Jessup, 11 Cal. 2d 273	15
Loan Association v. Topeka, 87 U. S. 655	21, 22
People v. King, 115 Cal. App. 2d Supp. 875	15
Rae v. Cal. Equipment Co., 12 Cal. 2d 563	15
Rindge v. County of Los Angeles, 262 U. S. 700	22
Seaboard Acceptance Corp. v. Shay, 5 P. 2d 882	15
Society for Savings v. Bower, 349 U. S. 143	22
Staub v. City of Baxley, 355 U. S. 313	23
United States ex rel. Tenn. Valley Authority v. Welch, 327 U. S. 546	22
Ward v. Love, 253 U. S. 17	23

RULES	
Rules of the United States Supreme Court, Rule 14	6, 8

STATUTES	
California Code of Civil Procedure, Sec. 1639	14
Los Angeles City Ordinance No. 110204	1, 2, 3
United States Constitution, Art. I, Sec. 10	5, 7
United States Constitution, Fourteenth Amendment	7, 10, 14

TEXTBOOK	
Sutherland on Statutory Construction, Sec. 83	15

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Appellees,

LOUIS KIRSHBAUM,

Intervenor.

On Appeal From the Supreme Court of the State of California.

BRIEF IN OPPOSITION TO DODGER'S MOTION TO DISMISS APPEAL.

Preliminary Statement.

Three related appeals involving Los Angeles City Ordinance No. 110204 are before this Court as causes Nos. 155, 279 and 291, October 1959 Term. In view of the more than usual complexity of the facts and pleadings in these cases, and the various procedures through which these appeals and the issues presented in them have evolved, a concise preliminary presented where ordinarily at this

point it might be repetitious. It is intended to bring the "history" of these appeals to date and to resolve each in its proper perspective.

Ordinance 110204 contains and authorizes a contract between the City of Los Angeles and the Brooklyn National League Baseball Club, Inc.* It was enacted by the City Council (10-4 vote), immediately "referendumed" by a petition signed by 82,121 persons, and at a referendary election was approved by a 1.9% majority.

Prior to the election Julius Ruben and Louis Kirshbaum filed separate taxpayer suits in the Superior Court of Los Angeles County challenging the validity of the ordinance and asking the court to restrain the city from entering into the contract. (*Ruben v. City of Los Angeles, et al.* and *Kirshbaum v. City of Los Angeles, et al.*) The suits were tried simultaneously at a trial held *after* the election.

Following the election, and before trial of the Ruben and Kirshbaum taxpayer suits, Kirshbaum filed an additional action in the Superior Court to enjoin the City Council from certifying the results of the referendary election until the Court determined the validity of the contract, on the grounds that if the ordinance were held invalid, a referendary election could not validate it.

The original Ruben and Kirshbaum taxpayer suits were tried first, and after extended deliberation, the trial court Judge declared the ordinance and the contract authorized by it to be unequivocally for a private purpose, for the gain of a privately owned, profit-making corporation, and completely beyond the power and discretion of the

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*Now the Los Angeles Dodgers, Inc.

City council—*i.e.* "ultra vires," "an abdication of its public trust," "a gross abuse of discretion," etc. (Superior Court's Opinion in *Ruben* case printed as Appendix B of J. S. in this case, No. 291; in *Kirshbaum* case, Appendix B, J. S. Case No. 155).

Faced with this adverse decision, the City sought a Writ of Prohibition from the California Supreme Court to prevent the Superior Court from hearing Kirshbaum's additional action to enjoin certification of the election results. (*City of Los Angeles v. Superior Court of Los Angeles County*). The California Supreme Court took jurisdiction, and ultimately adjudged the ordinance and contract valid (contrary to the Superior Court's emphatic opinion), and granted prohibition.

Simultaneously while seeking Prohibition the City and the Ball Club (a party to all the actions) appealed the Superior Court's decisions in the original *Ruben* and *Kirshbaum* cases. The appeal was made directly to the California Supreme Court, and was considered by the Court after it had rendered judgment in the Prohibition case. In a single decision covering both the *Ruben* and the *Kirshbaum* cases, the Court stated: "With one exception* all of the questions relating to the judgment in the Ruben and Kirshbaum cases * * * were resolved against

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*The exception related to the power of the Los Angeles Housing Authority to execute a quitclaim deed extinguishing the public purpose restriction contained in the deed by which the Authority originally conveyed to the City 169 acres of the property which the City under the contract authorized by ordinance 110204 agrees to convey to the Ball Club. The California Supreme Court in its judgment in the appeal from the Superior Court decision in the *Kirshbaum* case, ruled adversely to Kirshbaum who contends that the Authority does not have such power. Kirshbaum in case 279 is appealing from this portion of the California Court's judgment.

the taxpayers by our decision in *City of Los Angeles v. Superior Court*"—*i.e.* the Prohibition case. (Decision in the *Ruben* and *Kirshbaum* cases on appeal, Appendix to J. S. Case No. 279.)

Ruben and Kirshbaum both filed Notice of Appeal to this Court from the judgment of the California Supreme Court in the Prohibition case. However, instead of entitling their Notices of Appeal *City of Los Angeles v. Superior Court*, they entitled them *Ruben v. City of Los Angeles* and *Kirshbaum v. City of Los Angeles*, respectively. This was done because the issues finally adjudged in the Prohibition case and involved in the appeals, were first raised in the original taxpayer suits.

Kirshbaum also filed Notice of Appeal to this Court from the judgment the California Supreme Court rendered when the original *Ruben* and *Kirshbaum* cases came before the Court on appeal. Ruben did not file a Notice of Appeal from this judgment, presumably because the Court ruled the issues presented in the appeal of the *Ruben* case were *res adjudicata* by its decision in the Prohibition case. But the Court did rule on one issue in the *Kirshbaum* case (see footnote, p. 3 herein). Also, Kirshbaum had cross-appealed on another point and the Court ruled adversely to Kirshbaum on that.

Kirshbaum, pursuant to his Notice of Appeal from the Prohibition judgment, duly filed a Statement of Jurisdiction, docketed as case 155. In it, the principal questions raised are (1) Whether the California Supreme Court in granting Prohibition deprived Kirshbaum to the right of a trial to present evidence, including new evidence, in the Superior Court, in violation of the due process clause of the Fourteenth Amendment; and (2) whether

the ordinance is repugnant to Article I, Section 10, of the United States Constitution, in that it authorizes an impairment of a contract because it provides for extinguishment of a public purpose deed restriction in a deed to property which under the ordinance the City agrees to convey to the Ball Club free and clear of any restriction on use.

Kirshbaum next filed a Statement of Jurisdiction (case 279) pursuant to the Notice of Appeal from the California Supreme Court judgment in *Kirshbaum v. City of Los Angeles* on appeal. Question (2), *supra*, is raised again in this appeal, together with the added question of whether the Los Angeles Housing Authority would by issuing a second deed to the City eliminating the public purpose restriction contained in the original deed, be impairing a contract (arguing that the restriction was a contract) in violation of Article I, Section 10, of the United States Constitution.

On July 9, 1959, Ruben filed a Stipulation in the California Supreme Court, concurred in by the City and the Ball Club, to dismiss the appeal he had noticed from the Prohibition judgment. Kirshbaum thereupon petitioned this Court for an extension of time and permission to file an appeal raising questions posed in the Ruben Notice of Appeal. Kirshbaum pointed out that relying on Ruben to prosecute an appeal, he, Kirshbaum, had not raised certain constitutional questions in the Notice of Appeal and Statement of Jurisdiction he had filed in case 155, and that furthermore the rights of all taxpayers of the city, including Kirshbaum, who would be bound by Ruben's default, would be jeopardized. Mr. Justice Black then issued an order extending for thirty days the time in

which to file an appeal based on the Ruben Notice, and Kirshbaum filed within this time period a Statement of Jurisdiction pursuant to the Ruben Notice of Appeal, which is this case, 291.

At the same time Kirshbaum filed a formal motion to intervene for the purpose of presenting to this Court the issues raised by Ruben in the Notice of Appeal to which he had stipulated dismissal. This Motion to Intervene in effect formalized Kirshbaum's original telegraphed request that had resulted in Mr. Justice Black's Order. The City and Ball Club have filed briefs objecting to Kirshbaum intervening and pursuing the Ruben appeal. Principally they rely upon the Ruben Stipulation as having effected a dismissal of the appeal. Kirshbaum in a reply to these objections, being filed concurrently herewith, points out that the Ruben Stipulation to Dismiss was nugatory because it was not (as required by Rule 14 of this Court) filed in the court possessed of the record in the *Ruben* case; and that for other reasons the Statement of Jurisdiction filed by Kirshbaum pursuant to the Ruben Notice of Appeal is valid and within the discretion of this Court to accept.

Kirshbaum therefore submits herewith a Reply to the Dodger's Motion to Dismiss the appeal, and under this same cover, a Reply to the City's Motion to Dismiss.

I.

Reply to Ball Club's Argument.

Under Argument the Ball Club makes two statements, which Kirshbaum questions, and expresses two unsupported opinions.

1. "The only real question involved below was the validity of the contract *under state law*" (Ball Club's emphasis. Lines 5-6, p. 5, Ball Club's Motion to Dismiss).

Four pages (pp. 16-19) of the Statement of Jurisdiction herein list where Ruben raised the *Federal question* of the contract violating the due process clause of the Fourteenth Amendment of the United States Constitution in the course of this case through the state courts. At virtually every opportunity he pointed out that the contract violates the Fourteenth Amendment. The Superior Court in its opinion in the *Ruben* case passed on this specific Federal question. The question was clearly presented to the California Supreme Court, which declined to pass upon it. Similarly, Kirshbaum raised violation of Article I, Section 10 of the Federal Constitution and of the Fourteenth Amendment at various points throughout his pleadings.

2. The Ball Club then states that the California Supreme Court approved the contract "not once but twice." The facts are that the Court "passed" on the contract once, in its Prohibition judgment; then when the *Ruben* and *Kirshbaum* cases came before it on appeal, declared the issues presented *res adjudicata* by its Prohibition decision, and declined to review the contract again.

3. The Ball Club is, of course, entitled to its opinions that the contract is a matter of interest to the sports world but does not present any federal question and that the Supreme Court of California was correct in holding that the contract was for a public purpose. These are opinions that Appellant believes to be refuted by the facts and reading of the contract.

II.

Reply to Ball Club's Point I That the Appeal Is Not Within the Jurisdiction of the Court.

The Ball Club recites on page 3 that Ruben filed a Stipulation to Dismiss his Notice of Appeal, agreed to by the City and Ball Club, with the California Supreme Court, and then argues under the above heading this Court is therefore without jurisdiction to entertain the appeal. This overlooks the facts pointed out by Kirshbaum in his Replies to the Ball Club's and to the City's Briefs in Opposition to Intervention by Kirshbaum, being filed concurrently herewith, that the Ruben Stipulation to Dismiss was nugatory because it was filed in the California Supreme Court when it no longer possessed the record in the case; that prior to Ruben filing his Stipulation Kirshbaum, appealing from the same Judgment from which Ruben had Noticed his appeal, had docketed a Jurisdictional Statement (case 155) together with the record in the case with this Court; and that under Rule 14 of this Court, a Stipulation to Dismiss after a Notice of Appeal has been filed may only be filed in the court possessed of the record. Reference is made to the facts and argument in the Replies to the City's and Ball Club's Briefs in Opposition to Intervention with the request that they be considered incoporated here for the purpose of Answering Appellee's point I.

III.

Reply to Ball Club's Point II That the Federal Question Sought to Be Raised by Applicant Is Unsubstantial.

Appellant in Reply to the City's Motion to Dismiss filed concurrently herewith and under the same cover, has analyzed the finding of the State Court on most of the principal provisions of the contract, to show that each finding of the Court is untenable. As to the overall determination of the Court that the contract is for the purpose of securing for the city a baseball field known as Wrigley Field, and certain indefinite and limited recreational facilities for 20 years, Appellant respectfully refers this Court to the facts cited by Appellant at the conclusion of Section III of the Reply to the City. Appellant fails to see how after a reading of these facts and of the contract itself, and the evidence and testimony in this case, it is possible to conclude that the contract was for any other purpose than to induce the Dodger baseball team to locate in Los Angeles.

Appellant further submits that the quotation from the decision of the California Supreme Court is in itself evidence the Court was avoiding review of potential Federal questions. Having decided that the acquisition of a ball park, Wrigley Field, and some indefinite and limited recreational facilities gave the contract an over-all public purpose, the Court states that "in view of these direct benefits it is unnecessary for us to consider whether the City could *properly* expend public funds for the many other purposes"—all directly related to bringing major league baseball to Los Angeles—resulting from the contract. (Emphasis added to quotation.)

The Ball Club proceeds to state that legislative determinations by a city council are conclusive as to whether an

act is in the public interest. In the first place, what is involved here is not the public *interest*, but whether the contract was for a public *purpose*. If it was not for a public purpose, it was for a private purpose and thus violates the Fourteenth Amendment of the Federal Constitution.

Second, the Ball Club proceeds in contradiction to its own statement to cite the ruling in *County of Los Angeles v. Dodge*, 51 Cal. App. 498, that the assumption that a matter affects the public interest *(sic!)* is conclusive on the courts *unless* it is "plainly apparent to them that the view entertained by the legislative body is without just foundation."

Conclusion.

Appellant wishes to re-emphasize his sincere belief in the substantiality of the question involved in this contract. Does it permit private benefit at the expense of the taxpayers under the guise of public purpose—of getting a baseball park and some recreational facilities (this being the avowed public purpose) plus bringing the "industry" of major league baseball to Los Angeles? Is this contract to be allowed to pass for a public purpose, unreviewed by this Court, to establish, no one can say, how costly a precedent? Because the fact is obvious that it is not just this one contract that is involved. It is the hundreds, the thousands, the tens of thousands of others like it that may be written if it is approved, if it is said that it is lawful, opening the public coffers across the land, a threat to the treasury of every state, county, city and town.

Respectfully submitted,

PHILL SILVER,

Attorney for Intervenor, Louis Kirshbaum.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959.

No. 291

JULIUS RUBEN,

Appellant,

vs.

THE CITY OF LOS ANGELES, including the members of City Council, City Clerk and Mayor,

THE LOS ANGELES DODGERS, INC.,

Appellees,

LOUIS KIRSHBAUM,

Intervenor.

On Appeal From the Supreme Court of the State of California.

BRIEF IN OPPOSITION TO CITY'S MOTION TO DISMISS APPEAL.

The City's Motion to Dismiss is premised on two points: (1) That a substantial Federal Question is not presented, and (2) that the State Court based its judgment on non-federal grounds.

Neither the City nor the Ball Club contest that the Federal questions raised in this appeal were timely and properly raised in the state courts.

Actually, much of the City's argument that a substantial Federal question is not presented resolves to the fact that the State Court based its decision on an interpretation of the contract authorized by the ordinance that (Kirshbaum believes deliberately) avoided ruling on the Federal questions involved—which, in effect, is the City's second argument that the decision rests on non-federal grounds. This avoids a direct challenge of the substantiality of the all-important, basic Federal question raised by Appellant (Kirshbaum intervening for Ruben), namely:

Is the contract for a public purpose, to secure a ball park known as Wrigley Field for the City, along with certain indefinite* and limited recreational facilities?

Or, is it for the purely private purpose of offering public land, and dollars taken from the pockets of the taxpayers**, to induce a privately owned, profit-making baseball club to locate in Los Angeles?

Appellant submits that a simple reading of the contract reveals its obvious purpose, to induce the Dodgers to come to Los Angeles; that this inducement is an offer of millions of dollars of public land and money at taxpayer expense, and for the private gain of the Ball Club; and that the Wrigley Field ball park by the City was purely incidental thereto, and along with the indefinite recreational facilities

*Eighth Whereas clause of contract provides Ball Club will construct recreational facilities costing "*not to exceed*" $500,000.00. This same clause provides that during any event at the Ball Club's stadium, City shall not schedule an event at the recreational facility that will attract "a large number" of persons, and Ball Club shall have use of the recreational area for parking.

**The City tax rate was increased five cents this year to provide the two million dollars for grading the property for the Ball Club as provided in paragraph 3 of the Contract.

hardly can be termed the principal reason of the contract.

At the same time, Appellant submits that a reading of the State Court's decision discloses it to be on its face completely *untenable*, contrived, and particularly contrived to avoid a review by this Court of the basic Federal questions involved; in fact, so contrived as to defeat its purpose because the contrived grounds on which the decision is based are *inadequate* to sustain it.

I.

Reply to City's Argument That the Questions Presented Relate Solely to Interpretation of Ordinance 110204 Contrary to That Adopted by the California Supreme Court.

This is true. Appellant submits that the interpretation of the contract by the California Court is, as already stated, contrived and untenable.

The Waiver of Oil Rights by the Ball Club.

The finding of the California Supreme Court that the Ball Club having waived its interest in mineral rights conferred to it under the contract, this provision of the contract is no longer at issue, is refuted by:

(1) The Ball Club cannot unilaterally re-write a contract with the City; it cannot amend a City Ordinance.

(2) The revenue the Ball Club would receive from mineral rights under the contract provisions would go to the support of the Ball Club's Youth Program. This program was one of the inducements to the City to enter into the contract, a benefit the City expected to receive. The 7th Whereas clause states: "Whereas, such Club has a long-standing policy of * * * stimulating interest

in healthful recreational activities," the oil rights provisions waived by the Ball Club were not solely for its benefit, but for the mutual benefit of the Ball Club and the Ball Club and the people of the City, and the Ball Club cannot unilaterally waive them. They still stand as a provision of the Contract, and Appellant submits they do so in violation of the Fourteenth Amendment to the Federal Constitution in that they give public revenue and dominion over it to a private recreational program.

The Two Million Dollars to Be Spent by City in Manner Designated by Ball Club.

The City endeavors to refute Appellant's argument that the clause in the contract providing for the City to spend two million dollars, "the manner in which such money shall be spent * * * to be designated by Ball Club" (Contract Para. 3) by citing the opinion of the California Court, in which the Court in effect finds there is nothing wrong in this because: "The City could have paid the money to the club outright, as part of the contract consideration." But a contract, or a City Ordinance must be construed as written, not as it might have been written.

California Civil Code, Sec. 1639:

> "In construing a contract the intention of the parties must be ascertained from the writing alone if possible."

Barker v. Sherman, 123 Cal. App. 2d 810, 812:

> "When the language of a contract is plain and unambiguous, it is not the province of a court to make a new contract or alter by construction what has been agreed upon."

Even to save an ordinance a Court cannot rewrite it, or alter it to conform to a presumed intention which is not expressed.

Seaboard Acceptance Corp. v. Shay, 5 P. 2d 882, 884;
People v. King, 115 Cal. App. 2d Supp. 875;
Rae v. Cal. Equipment Co., 12 Cal. 2d 563, 568;
County of Los Angeles v. Jessup, 11 Cal. 2d 273.

"No court in its effort to save a law can properly pervert or destroy its plain meaning, and so make it express that which the legislature did not declare." (*Lewis Sutherland on Statutory Construction*, Sec. 83.)

In *Seaboard Acceptance Corp. v. Shay, ibid.*, it was plainly stated:

"This Court has no power to rewrite the statute so as to make it conform to a presumed intention which is not expressed. This Court is limited to interpreting the statute, *and such interpretation must be based on the language used.*" (Emphasis added.)

But even if this were not so, the Court's contrived opinion fails under simple reasoning. If the City and Ball Club had intended only that the City should pay the Ball Club two million dollars; this could have been very simply stated. But it was not. In its place a more complicated procedure was evolved and agreed upon. Why did the City and Ball Club choose this round-about, complicated manner for expressing what the California Court holds to be but a simple monetary consideration? Was it because it would become an unlawful gift of public money if it were expressed as a pure consideration? Or was it be-

cause it would enable the Ball Club to obtain services which it would not otherwise, or could not otherwise legally obtain? These and other reasons that might be advanced are beside the point: the contract must be construed as written, the ordinance as enacted. The California Court's rewriting of the contract is completely untenable.

City's Agreement to Purchase Additional Property for the Ball Club.

Here again the State Court rewrites the contract, bases its decision not on what is written in the contract, but on what *might* have been written, states that "If the City had so desired, it clearly could have added to the contract price, in cash, the reasonable value of the additional land which it agreed to use its best efforts to acquire."

But the City did not do this. In fact, it is impossible as a practical matter, as Appellant will show, for the City to determine any "reasonable" value for an indefinite quantity of land to be bought over an indefinite period of time, from numerous owners, under widely varying circumstances. Once more, Appellant respectfully argues, the Court's finding on this important clause of the contract, is simply untenable.

And here the reasoning of the Court fails even more so than in the Court's suggestion that the City could have simply paid the Ball Club two million dollars, instead of agreeing to spend it at the Ball Club's direction.

Here the City agrees to "use its best efforts" to purchase a score of individual parcels of land ranging from lots to tens of acres each in size, from a score of owners, some private, some public agencies, and to pay up to a "reasonable" price—the land then, under the contract, to be conveyed to the Ball Club. But who is to say how many

of the owners will sell? How many parcels, and what size and price parcels the City may be able to acquire? And at what price? What is a "reasonable" price? The value of the land when the contract was written, zoned residential (an undesirable zoning for the area that substantially lowered its value), and hilly in parts and relatively inaccessible? Or is it the value at which the Ball Club is to receive the land from the city, most of it zoned for business (the City Planning Commission has already approved business zoning for about 200 acres), with two million dollars spent grading and levelling it, and with another nearly three million ($2,740,000 from the County) spent on access streets to it? Plainly it would be impossible to substitute a monetary amount for this provision in the contract, just as plainly as the provision calls for the City to purchase the land for the unlawful purpose of conveying it to a private, profit-making corporation.

But the Court offers another "out"; and Appellant submits that it almost declares that it is all right for a city to do something that it could not otherwise legally do, so long as in doing it the city receives a good bargain:

> "While a city may not purchase land when no public use or purpose is involved, in the present case the additional land is to be acquired for a proper public purpose, namely that of furnishing the type of contract consideration which enables the city to enter into a bargain which it deems advantageous."

What doors this opens for any unscrupulous among the legislators? What precedent it will set if allowed to stand!

City's Agreement to Vacate Streets Designated by Ball Club.

Appellant turns simply to the record to establish, in refutation to the city's argument under this point. The following is quoted from the Reporter's Transcript in *Ruben v. City of Los Angeles* and *Kirshbaum v. City of Los Angeles*, page 450:

"The Court: Then isn't the vacation of the streets so that there can be a ball park one of the prime considerations that the ball club is to get?

Mr. Works: Yes: * * *

* * *

The Court: * * * would the Dodgers execute a contract with the City that did not contain this provision?

Mr. Works: I suppose not."

Mr. Works is attorney for the Ball Club. In the words of the Superior Court opinion in *Ruben v. City of Los Angeles* (Appx. B. J. S. herein, 291, p. 20): *"The transaction bears all the indicia of a bargain and sale."*

Conclusion to Section I.

On page 6, the City questions the meaning of the fourth point raised in the Ruben Notice of Appeal and cited by Kirshbaum (intervening for Ruben) in his Jurisdictional Statement filed pursuant to the Ruben Notice. Kirshbaum believes Ruben intended a collective reference to the several places in the contract, as well as to each individually, where the Ball Club is delegated authority over the expenditure of public money, and will brief this point more thoroughly if this Court grants a hearing on the merits.

At the bottom of page 6 and on page 7 the City challenges the reasoning of Appellant because it is at variance with the interpretation of the Contract by the California Supreme Court. There would be no case here, of course, if that were not so. It is the analysis that Appellant and many others have made of the contract that is submitted to this Court for its learned and experienced judgment, in opposition to the construction the State Court has employed, Appellant respectfully submits, in an effort to "save" the contract.

The specific points implied, if not directly stated by the City on pages 6 and 7, to-wit: That the question posed by Appellant, whether the contract is for a public or private purpose, is an unsubstantial question; and that it is unsubstantial because the contract is "obviously" for the public purpose of securing Wrigley Field and certain recreational facilities for the City, have been answered in Appellant's Reply to the Ball Club's Motion to Dismiss, being filed concurrently under this same cover. Reference is respectfully made to Appellant's Reply therein to the Ball Club's Point II, that The Federal Question Sought to Be Raised by Applicant Is Unsubstantial, with the request it be incorporated as part of Appellant's reply herein.

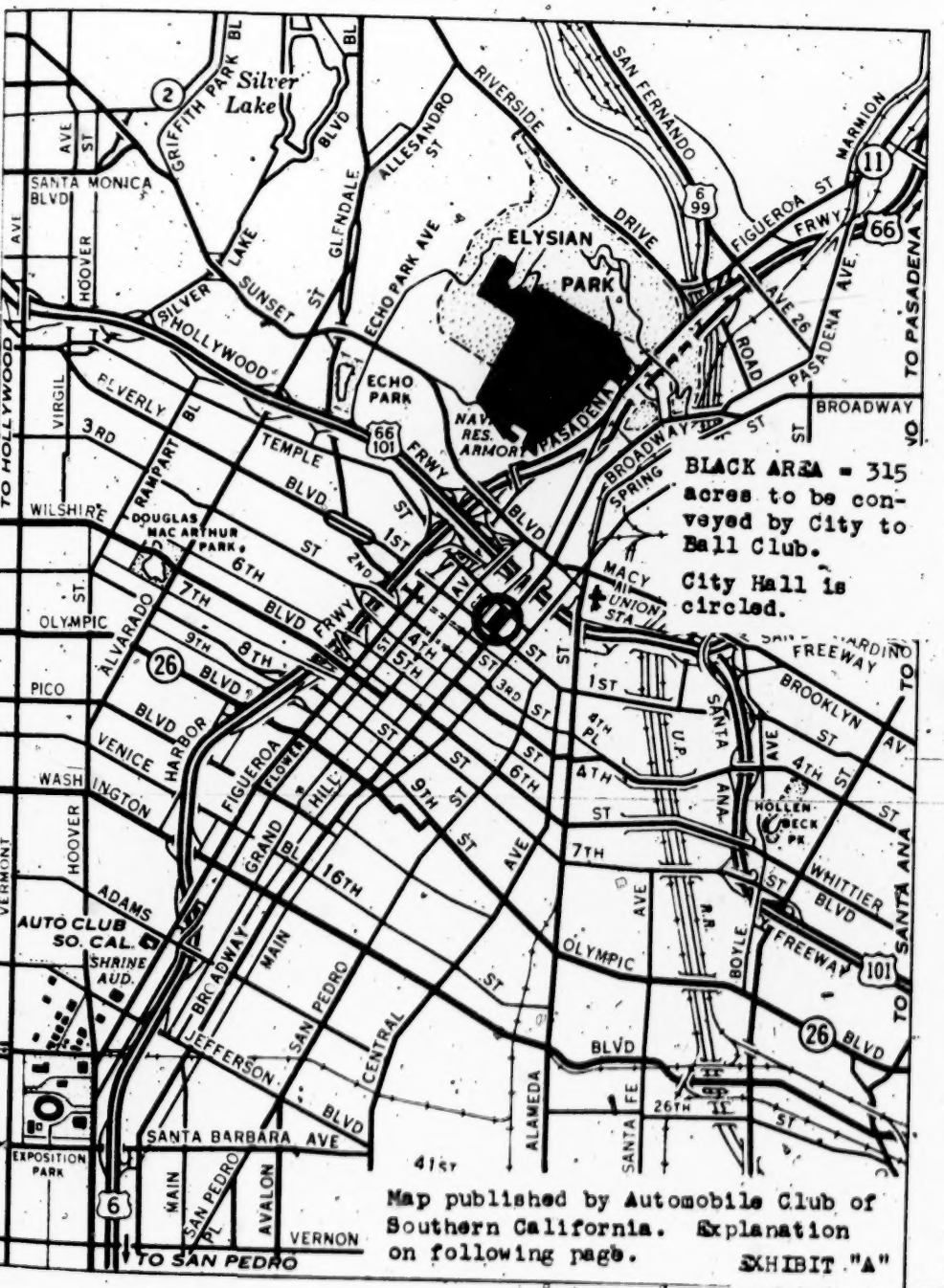
On page 7 the City implies the recreational facilities will cost $500,000. This assertion has been too often made to permit it to go unchallenged. What the recreational facilities will cost *no one knows*, because *the contract does not say*. The contract states they shall cost *"not to exceed"* $500,000—and one dollar, or a thousand dollars could *not exceed* $500,000. It would be ridiculous (although possible) to suggest the Ball Club will not spend more than a thousand dollars. But it is not amiss to challenge that they will spend $500,000 or possibly any-

thing approaching it. The amount they will spend is simply indefinite—just as use of the facility is limited, as far as large gatherings are concerned, to times when the Ball Club is not using the stadium.

The City is concerned that Appellant should describe the 315 acres the Ball Club receives from the City as "downtown Los Angeles property." The word "downtown" is admittedly not definitive, but included is a map—since the City has raised the point—published by the highly respected Automobile Club of Southern California, and entitled DOWNTOWN LOS ANGELES. The 315 acres conveyed to the Ball Club under the contract have been shaded. The nearest point of the area, as close as Appellant can scale it on a United States Geological Survey map (Los Angeles Quadrangle) lies about 4,600 feet from the City Hall, and about 1,600 feet from the nearest ramp of the four-level interchange which is the hub of the Los Angeles Freeway system.

The value of the acreage, $6,000 to $7,000 per acre, which the City says Ruben admits, applies, of course, to the land as it was, in numerous parcels and ownerships, zoned residential (an undesirable zoning in the area, substantially reducing values), relatively hilly, and with poor access. The value of the land after the City has gathered it into one large parcel, zoned it for business (the City Planning Commission has already approved business zoning for about 200 acres in spite of protests that land around a 50,000-seat stadium should more logically be zoned with the City's P zoning for parking), with two million dollars spent levelling and grading it, and almost three million ($2,740,000 per contract) building access roads to it—under these conditions the value of this downtown property will certainly be many millions.

DOWNTOWN LOS ANGELES



BLACK AREA = 315 acres to be conveyed by City to Ball Club.

City Hall is circled.

Map published by Automobile Club of Southern California. Explanation on following page.

EXHIBIT "A"

EXHIBIT A-1.

SEAL

Automobile Club of Southern California
Law Department
HARRY V. CHESHIRE, JR.
General counsel

September 14, 1959

Mr. Phill Silver
Attorney at Law
1680 North Vine Street
Hollywood 28, California

Dear Mr. Silver:

This is in reply to your letter of September 11, 1959, inquiring about an Automobile Club map entitled, "Downtown Los Angeles".

While we do not publish separately a map entitled "Downtown Los Angeles," a map so entitled does appear on the back of our map of "Metropolitan Los Angeles". A copy of the map is enclosed.

Our Travel Services Division has supplied the following information in response to your specific request:

This map of "Downtown Los Angeles," appearing on the back of our "Metropolitan Los Angeles" map has been published since May, 1956. Since that time approximately 377,500 copies of the map have been distributed. The map is prepared by our own map drafting department to show, particularly, and in some detail, the area surrounding the so-called four-level interchange of freeways.

You state in your letter that you desire this information in connection with a brief you are filing with the United States Supreme Court. Under such circumstances, please understand that the foregoing identification of one of our maps in no way indicates that the Automobile Club takes any position regarding the merits or outcome of such litigation.

Yours very truly,

/s/ HARRY V. CHESHIRE, JR.
HARRY V. CHESHIRE, JR.
General Counsel

HVC:JH
Enc.

The City protestations about the unknown millions to be paid by the taxpayers is perhaps best answered that the truth sometimes hurts: two million for grading, about three million committed for access roads, nearly a million spent purchasing land for the Ball Club—and no one knows how many more millions ultimately will be needed for storm drains, sewers, street lighting, traffic signals—all that goes with such a development; the total has to be in the millions. The City's further protestation, that "this kind of money is simply not forthcoming in this area" might be challenged by taxpayers receiving their bills next month which will include a five cent tax raise to provide the two million for "preparing" the property for the Ball Club!

II.

Reply to City's Point That the United States Supreme Court Will Be Guided by the Interpretation of the Ordinance Adopted by the California Supreme Court.

This is mostly a recitation of points already made by the City, but citing cases. The points have been answered by Appellant in this brief and in the Brief in Reply to the Ball Club's Motion to Dismiss, to which reference again is made.

The City believes that *Loan Association v. Topeka*, 87 U. S. 655, has no place here. Appellant sees a definite parallel. In the *Loan Association* case, tax money was used to encourage an Iron Works to locate in Topeka. In this instance, public money is being used to induce a professional ball club, which no one denies to be a private business, to locate in Los Angeles.

Under this heading the City rightfully poses the basic issue by citing further from the *Loan Association* case: Is the contract for a private or public purpose? Having previously brushed aside this, the basic issue, the City now admits that "the case at bar falls within the purview of the role of the Courts" as stated in the *Loan Association* case. It admits that the Courts may intervene when Legislatures over-eagerly enact legislation that imposes a tax for a private rather than a public purpose. There are other cases, as amply cited in Appellant's Jurisdictional Statement herein, which express an even greater wariness of this Court to inquire for itself, when the question is brought before it, whether state legislation which ultimately taxes the people, is for a public or private purpose. Thus in *Rindge v. County of Los Angeles*, 262 U. S. 700: "The nature of a use, whether public or private, is ultimately a judicial question." And in *U. S. Ex. Rel. Tenn. Valley Authority v. Welch*, 327 U. S. 546, (1945): "This Court has never deviated from the view that under the constitution a claim that a taking is not for a public purpose is open to judicial decision ultimately by this Court."

Regarding *Society for Savings v. Bowes*, 349 U. S. 143, does it make any difference whether this Court inquires if a tax imposed is merely a characterization of a tax, or if a contract ultimately requiring the expenditure of tax funds and land bought with tax dollars, is wrongly characterized as a public purpose? The point is, the Court appears willing to make the inquiry.

The City argues (p. 9) that no claim has been made that the ordinance is not what it purports it to be. But the claim is made; and it is further made that it is not what the state court purports it to be.

III.

Reply to City's Point That the Judgment Rests on an Adequate Non-Federal Basis.

The City argues that the California Court based its judgment on non-federal grounds and that Constitutional questions thereupon ceased to be involved.

In *Staub v. City of Baxley*, 355 U. S. 313, 319: "The assertion of Federal rights when plainly and clearly made is not to be defeated under the name of local practice."

And in *Ward v. Love*, 253 U. S. 17, 22, appellant suggests that the principle stated is particularly applicable to this case: "It is therefore within our province to inquire not only whether the right was denied in express terms, but also whether it was denied in substance and effect, as *by putting forward non-federal grounds of decision that are without any fair or substantial support.*" (Emphasis added.)

In *Broad River Co. v. South Carolina*, 281 U. S. 527, Mr. Justice Stone stated: "Even though the Constitutional protection invoked be denied on non-federal grounds, it is the province of this court to inquire whether the decision of the state court rests upon a fair and substantial basis. If unsubstantial, Constitutional obligations may not be thus evaded."

Was the contract based on adequate, tenable, fair and substantial state grounds? The State Court found that it was for the public purpose of securing a baseball park known as Wrigley Field and the indefinite and limited recreational facilities discussed previously herein. But were these the real purpose of the Contract? Appellant cites these facts:

On May 3, 1957, a secret Memorandum was prepared by the Los Angeles City Attorney after a conference of

certain select city officials, including the mayor, with Mr. Walter O'Malley of the Dodgers. The Memorandum was introduced as evidence in the Superior Court trial of the Ruben and Kirshbaum cases, and is part of the record before this Court. It begins "At a conference today held at the Statler Hotel discussion was had involving the possibility of bringing major league baseball to Los Angeles." There was nothing about securing Wrigley Field or recreational facilities—except as they were set down as incidental items in a list of provisions that would be involved—there is no question about it—in any inducement to Mr. O'Malley to bring his Dodger baseball club to Los Angeles. All of the principle terms of the contract later enacted by the Los Angeles City Council and now at issue herein, originated and were set forth in that memorandum regarding "bringing major league baseball to Los Angeles."

On June 11, 1957, the mayor wrote the Los Angeles Housing Authority asking that the public purpose restriction on the 169 acres the City secured from the Housing Authority and agrees in the contract to deed to the Ballclub, be "redrawn" so as not to "hamper the private financing of a major league baseball park." [Ex. L, Kirshbaum Pet. Mandamus, *Kirshbaum v. City of Los Angeles* No. 699077.] Thereafter Mr. Harold McClelland was appointed by the Mayor to negotiate with Mr. O'Malley. Then, on September 16, 1957, the Los Angeles City Council adopted "Resolution for Dodger Baseball" (p. 134, Return Julius Ruben, etc. Prohibition case, L. A. 25113). Finally the contract itself was adopted.

Appellant submits these facts speak for themselves.

Respectfully submitted,

PHILL SILVER,

Attorney for Intervenor Louis Kirshbaum.

FILE COPY

Office-Supreme Court, U.S.
FILED
SEP 16 1959
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

October Term, 1959
No. 291

JULIUS RUBEN,

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THE LOS ANGELES DODGERS, INC.,

Appellees,

LOUIS KIRSHBAUM,

Intervenor.

On Appeal From the Supreme Court of the State of California.

Reply to Brief of City in Opposition to Motion of Louis Kirshbaum to Intervene as Appellant.

and

Reply to Brief of Los Angeles Dodgers, Inc. in Opposition to Motion of Louis Kirshbaum to Intervene as Appellant.

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SUBJECT INDEX

PAGE

Reply to Brief of City in Opposition to Motion of Louis Kirshbaum to Intervene as Appellant..... 1

Statement of facts..... 1

Arguments 8

I.

Reply to argument by the City in its Statement of the Case that Ruben did not appear in the California Supreme Court as a representative taxpayer and therefore another taxpayer has no inherent right to intervene..... 8

II.

Reply to City's point under heading "Argument" that the only party taking a timely appeal in the Ruben case was Ruben himself and it is now too late for any other party to be permitted to become an appellant..... 11

III.

Reply to City's Point I that no appeal may be had where not taken within the statutory time allowed therefore..... 13

IV.

Reply to City's Point II that parties cannot be added on appeal who were not parties to the cause in the court below 14

Reply to Brief of Los Angeles Dodgers, Inc., in Opposition to Motion of Louis Kirshbaum to Intervene as Appellant..... 21

TABLE OF AUTHORITIES CITED

CASES

American Brake Shoe and Foundry Co. v. Interborough Rapid Transit Co., 6 F. R. S. 73a.42 17

Ash v. City of Omaha, 41 N. W. 2d 386 18

Federal Communications Commission v. Sanders Bros. Radio Station, 309 U. S. 470 ..... 17, 18

Floersheim v. Bd. of Commissioners of New Mexico, 212 Pac. 451 9

Hartford Accident and Indemnity Co. v. Bunn, 288 U. S. 169 13

Park and Tilford, Inc. v. Schulte, 160 F. 2d 984 17

Price v. Sixth Agricultural District, 201 Cal. 502 9

Sage, et al. v. Central R.R. Co., et al., 93 U. S. 412 18

Wightman v. City of Wayne, 22 N. W. 2d 294 19

Williams v. Morgan, 111 U. S. 684 18

Winkleman v. General Motors, 48 Fed. Supp. 490 17

RULES

Federal Rules of Civil Procedure, Rule 23(a) 16

Federal Rules of Civil Procedure, Rule 23(a)-1 16

Federal Rules of Civil Procedure, Rule 23(c) 16, 17

Federal Rules of Civil Procedure, Rule 24(a)-2 17

Rules of the United States Supreme Court, Rule 14(1) 5, 7, 12, 22

STATUTES

Federal Communications Act, Sec. 4402(b) 17

Los Angeles City Ordinance No. 110204 ..... 1, 2, 3

TEXTBOOKS

2 Bender's Federal Practice, p. 613 17

3 Moore's Federal Practice, p. 3549 16

3 Moore's Federal Practice, p. 3560, par. 5 16

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Reply to Brief of City in Opposition to Motion of Louis Kirshbaum to Intervene as Appellant.

Statement of Facts.

Following the enactment by the Los Angeles City Council of Ordinance 110204, Julius Ruben and Louis Kirshbaum filed separate taxpayer suits challenging the validity of the ordinance and seeking a court order to prevent the City from entering into a contract with the Brooklyn National League Baseball Club, Inc., as authorized by and contained in the ordinance. (*Ruben v. City of Los Angeles, et al.*, and *Kirshbaum v. City of Los Angeles, et al.*)

The City admits that *Ruben v. City of Los Angeles* was a representative taxpayer's suit, in which Ruben appeared "on behalf of taxpayers as a class". (City's Brief in Opposition to Intervention, p. 4), and Ruben himself alleges in

his pleadings that he was appearing on behalf of himself and "all other citizens and taxpayers resident in the City of Los Angeles."

The Ruben and Kirshbaum taxpayer suits were tried together in the Superior Court of Los Angeles County. Each suit attacked the validity of the ordinance on different grounds, although with some intermingling of points. Recognizing this, the Court limited Ruben to arguing only those issues not previously argued by Kirshbaum, and vice versa. [Rep. Tr. p. 318, lines 1, 2.] There is a single Reporter's Transcript for both cases and on motion of Ruben all evidence introduced in the *Kirshbaum* case was considered to be introduced in the *Ruben* case.

The Court rendered judgment in favor of Ruben and Kirshbaum, issuing two separate opinions. But at the beginning of the *Ruben* opinion the Court stated: "The points raised in this case and decided in the Kirshbaum case will not be repeated in this memorandum"; and at the end of the opinion, in ordering judgment for Ruben, based the judgment in part on issues decided in the *Kirshbaum* case "which are within the issues of this case." (Memorandum Decision of Superior Court, Appx. B, S. J. herein, case 291, pp. 16 and 26.)

Prior to trial of the *Ruben* and *Kirshbaum* taxpayer suits, Ordinance 110204 was submitted to a referendary election and approved by a 1.9 per cent majority. Kirshbaum then, in an additional action, petitioned the Superior Court to enjoin the City Council from certifying the results of the election until the Court had determined the validity of the ordinance and contract.

When the Superior Court ruled in favor of Ruben and Kirshbaum in the taxpayer suits, the City immediately

petitioned the California Supreme Court for a Writ of Prohibition to prevent the Superior Court from hearing the action in which Kirshbaum sought to enjoin certification of the election results. (*City of Los Angeles v. Superior Court of Los Angeles County.*) Ruben and Kirshbaum were named parties in interest and responded. Ruben filed a "Return . . . by Way of Answer and Brief" in which he stated (p. 1) that he was appearing on behalf of himself and "all other taxpayers of said City" (Los Angeles). (See p. 9 herein.)

The California Supreme Court accepted jurisdiction in prohibition and by stipulation of all parties the record of the *Ruben* and *Kirshbaum* taxpayer cases in the Superior Court was made a part of the record of the prohibition proceedings. [Rep. Tr. *City of Los Angeles v. Superior Court*, p. .....] The Court granted prohibition and *inter alia* rendered an opinion declaring Ordinance 110204 *valid*.

At the same time it was seeking prohibition, the City, along with the Ball Club (a party to all the proceedings) appealed the decisions of the Superior Court in the *Ruben* and *Kirshbaum* taxpayer suits. These appeals were taken directly to the California Supreme Court, and were considered by that Court *after* it had rendered judgment in the prohibition case. The Court disposed of the appeals in a single opinion, stating that with one exception (see below) the issues presented in the *Ruben* and *Kirshbaum* cases on appeal had been resolved "against the taxpayers" in the judgment rendered in the prohibition case.

Ruben and Kirshbaum thereupon each filed a Notice of Appeal to the United States Supreme Court from the judgment of the California Supreme Court in *the prohibition case, City of Los Angeles v. Superior Court*. How-

ever, Ruben entitled his Notice of Appeal *Ruben v. City of Los Angeles*. Presumably this was because he considered the prohibition judgment a final decision on the issues he had first raised in *Ruben v. City of Los Angeles*. Similarly, the Kirshbaum appeal from the prohibition judgment is entitled *Kirshbaum v. City of Los Angeles*.

Ruben did not file an appeal to this Court from the judgment of the California Supreme Court in *Ruben v. City of Los Angeles* on appeal, in which the Court held the issues presented to be *res adjudicata* by its decision in the prohibition case. Kirshbaum, however, did appeal to this Court (Case 279) the decision in *Kirshbaum v. City of Los Angeles* on appeal, because the one issue the Court held not *res adjudicata* and passed upon in considering the appeals, was an issue Kirshbaum had raised; also the Court decided adversely to Kirshbaum a cross-appeal Kirshbaum had filed.

After filing Notice of Appeal from the prohibition judgment, Kirshbaum filed with this Court a Statement of Jurisdiction, docketed as Case 155. At the same time, Kirshbaum docketed in this Court the record of *City of Los Angeles v. Superior Court* (the prohibition case), and the Superior Court record of *Kirshbaum v. City of Los Angeles* and *Ruben v. City of Los Angeles*, including those portions of these records designated by Ruben in his Notice of Appeal. (In any event, the record in the *Ruben* and *Kirshbaum* taxpayer suits was made a part of the record in the prohibition case—p. 3, *supra*.) This Court thus became possessed of the record in *all* the above cases. This record was shipped jointly by Ruben and counsel for Kirshbaum to this Court (see shipping label) and at the request of Ruben, counsel for Kirshbaum included as the

second sentence in the *Kirshbaum* Statement of Jurisdiction (Case 155), the statement: "Julius Ruben, appealing on *the same record*, is filing a separate jurisdictional statement." The Statement of Jurisdiction was served on Ruben, the City and the Dodgers, and none of them has protested the statement therein that Ruben was appealing on *the same record.*

On July 9, 1959, two days before the final date on which Ruben could file a Statement of Jurisdiction pursuant to his Notice of Appeal, Ruben filed in the California Supreme Court, without notice to Kirshbaum, a "Stipulation to Dismiss Appeal to the Supreme Court of the United States." This stipulation was joined in by the City and the Dodgers, and provided: "that the notice of appeal and the appeal herein of said Julius Ruben be dismissed without costs." However, this stipulation was of no effect, if for no other reason than that the California Court was no longer possessed of the record. As pointed out above, *this Court possessed the record.*

Rule 14(1) of the Rules of this Court provides that after a Notice of Appeal to this Court has been filed, and before the appeal has been docketed, the appeal may be dismissed by stipulation only in *the Court possessed of the record.*

Upon learning that Ruben was abandoning his appeal, counsel for Kirshbaum immediately telegraphed the California Supreme Court and pointed out that the *Ruben* case was a representative taxpayer's suit, that counsel for Kirshbaum relying on Ruben to prosecute his appeal to the United States Supreme Court had omitted raising certain important federal questions in Case 155, that the

rights of all taxpayers were in jeopardy, and that a citizens taxpayer group had requested counsel for Kirshbaum to ask the California Supreme Court to grant an extension of time in which to substitute another taxpayer for Ruben and in which to file an appeal to the United States Supreme Court based on the Ruben Notice of Appeal. This request to the California Court was made pursuant to the rules of this Court that a request for an extension of time for filing an appeal shall first be made to the lower court, and thereafter, if denied, may be made to this Court.

The California Supreme Court denied the request. Counsel for Kirshbaum then addressed a similar request by telegram to this Court, and this telegram was filed with the Clerk of this Court before the expiration of the time for filing a Statement of Jurisdiction based on the Ruben Notice of Appeal.

On July 13, 1959, Mr. Justice Black, in response to this telegraphed request by counsel for Kirshbaum, ordered that in *Ruben v. City of Los Angeles*, the "time for filing any appeal appellant may be legally entitled to file in the above-entitled cause be, and the same is hereby extended to and including August 10, 1959."

Pursuant to Mr. Justice Black's order, appellant Kirshbaum filed within the time designated, a Statement of Jurisdiction based on the Ruben Notice of Appeal, which was docketed as Case 291 (this case). Concurrently therewith Kirshbaum filed a Motion to Intervene in the *Ruben* appeal, believing it proper to thus formalize the telegraphed request that resulted in Mr. Justice Black's Order. This is the motion the City and Dodgers (in separate briefs) now oppose.

* * *

In spite of the preceding facts, the City argues: (a) That Ruben did not appear in the California Supreme Court, in the prohibition case, as a representative taxpayer (completely ignoring that Ruben stated to the Court that he was appearing on behalf of "all other taxpayers of said city"); (b) That Ruben has dismissed his appeal and it is now too late for anyone else to intervene (disregarding Rule 14(1) of this Court which provides that the appeal be dismissed in the Court possessed of the record); and (c) That parties cannot be added on appeal who were not parties to the cause below (knowing that Kirshbaum was a party to the prohibition case, from the judgment in which Ruben filed his Notice of Appeal, and which the City admits is the "subject action" herein—3rd par., p. 4, City's Brief). In addition, as pointed out hereafter, pages 9-10, all taxpayers are parties to any taxpayer action by which they might ultimately be bound.

The only other argument submitted by the City in opposition to intervention by Kirshbaum to continue the Ruben appeal is that some claimants in some early Admiralty and prize cases (1850 and earlier) who had not filed any claim in the lower court were not permitted to do so for the first time in the United States Supreme Court. These cases have no relation to the facts here, namely that Kirshbaum *was* without any question a party to the subject cause below and they are hardly to be compared to the important circumstances here, where the rights of a class, of all the taxpayers of a city of two million, are jeopardized and could be foreclosed if intervention is not granted for the single purpose of continuing an appeal already commenced by a once professed representative of the class, who now seeks to abandon it.

ARGUMENTS.

I.

Reply to Argument by the City in Its STATEMENT OF THE CASE That Ruben Did Not Appear in the California Supreme Court as a Representative Taxpayer and Therefore Another Taxpayer Has No Inherent Right to Intervene.

It is difficult to believe that the City is not aware that Ruben at all times, both in the Superior Court and in the California Supreme Court, appeared as a representative taxpayer. This is so unquestionably the case, and so obvious from the record, that it is regrettable to burden this Court with argument about it.

Ruben stated in his original complaint filed in the Superior Court that his suit was being brought on behalf of himself and "all other citizens and taxpayers resident in the City of Los Angeles."

In an amended complaint he repeats this representation, even adding that the complaint is filed on behalf of "all citizens of California."

The City admits that Ruben in the Superior Court, in *Ruben v. City of Los Angeles*, appeared "on behalf of taxpayers as a class" (quoting the City's Brief in Opposition to Intervention, p. 4). But the City asks this Court to believe that when Ruben subsequently responded in the California Supreme Court in the prohibition case, *City of Los Angeles v. Superior Court of Los Angeles County*, in which final judgment was rendered on the issues Ruben had raised in the Superior Court, he no longer represented the taxpayers, but only himself. The City presents to this Court an abbreviated title "Return of Julius Ruben . . ." appearing on the cover of a brief for identification pur-

poses, as an argument that this establishes the complete cause of action set forth therein. (City's Br., p. 3.) On the first page Ruben states (just as he stated to the Superior Court) that he and Harry Leary, the executor of the estate of a taxpayer who had originally joined with Ruben, "answer herein as an original proceeding, and as taxpayers of the City of Los Angeles and on behalf of themselves and *all other taxpayers of the city.*" (P. 1, par. 2, Return of Julius Ruben, etc., *City of Los Angeles v. Superior Court*, Cal. S. Ct. Case No. L.A. 25113.)

Ruben, having thus established himself unequivocally in both the California Superior and the California Supreme Courts as the representative of all the taxpayers, it would have been unnecessary and superfluous, as Ruben undoubtedly realized, to repeat this allegation in each subsequent procedure. It is basic law that the class action followed each new procedure taken by Ruben, whether it was filing a petition for rehearing, or a notice of appeal, or any other notice or pleading.

Even if Ruben had not at any point specifically stated he was appearing as a representative of all taxpayers, every taxpayer action is a representative class action which binds all other taxpayers whether or not the pleadings allege that it is brought in their behalf. In *Price v. Sixth Agricultural District*, 201 Cal. 502, 514, the California Supreme Court cites this rule, quoting *Floersheim v. Bd. of Commissioners of New Mexico*, 212 Pac. 451: "Where a suit is brought to determine a public right, involving a matter of general interest . . . all citizens and taxpayers of the County are parties to the proceeding by representation, and are bound by the judgment."

In this same case the California Supreme Court emphasizes that a decision in a suit brought by one taxpayer is *res adjudicata* against all other taxpayers, without regard as to whether they are specifically named; and, citing a New Mexico case, is *res adjudicata* "not only as to matters which were litigated, but also as to matters which existed at the time and which could have been litigated in the case." The California Supreme Court has recognized this in the instant case, *Ruben v. City of Los Angeles*. When, after the decision in the prohibition case, *Ruben v. City of Los Angeles* came before the Court on appeal, the Court stated: "With one exception all questions relating to the judgment in the Ruben and Kirshbaum cases . . . were resolved *against the taxpayers* by our decision in *City of Los Angeles v. Superior Court*." (Emphasis added.) (Opinion of Cal. S. Ct., Appx. to J. S., Case 291, p. 7.)

Thus, even if Ruben had not specifically represented to the California Supreme Court that he was appearing on behalf of all other taxpayers, he nonetheless represented all the taxpayers; his every legal step bound the taxpayers; and his Notice of Appeal was a Notice of Appeal on Behalf of all the taxpayers of the City.

But Ruben *did* specifically aver to the Superior Court and to the California Supreme Court that he was representing all the taxpayers of the City, and neither the City, nor the Dodgers, nor the Court contested it; in fact, the Court *recognized it* (*supra*). It becomes an absurdity to argue the point further.

The City adds the argument that because Ruben signed "Julius Ruben, pro per" throughout, he was representing himself and no other taxpayer. The argument is frivolous. After stating clearly in various pleadings that he was

suing on behalf of *all taxpayers*, the fact that he signed "pro per" obviously meant that he, Ruben, himself was the representative taxpayer, or, were others joined with him, that he was one of the representative taxpayers.

II.

Reply to City's Point Under Heading "ARGUMENT" That the Only Party Taking a Timely Appeal in the Ruben Case Was Ruben Himself and It is Now Too Late for any Other Party to Be Permitted to Become an Appellant.

It is assumed that the City is trying to argue that Ruben dismissed his appeal to the United States Supreme Court when he filed his Stipulation to Dismiss in the California Supreme Court on July 9, 1959, and that by then the time had elapsed in which anyone else could file a Notice of Appeal from the judgment of the California Supreme Court in the prohibition case, from which Ruben was appealing.

As pointed out herein, page 5, the facts show that Ruben's stipulation to dismiss his appeal was improperly filed with the California Supreme Court because at the time it was filed that Court was no longer in possession of the record in the case. Briefly repeating the facts: The *Ruben* record had been docketed in this Court by Kirshbaum when he filed his Statement of Jurisdiction in Case 155, on June 26, 1959. *At Ruben's request* counsel for Kirshbaum included in the opening paragraph of the Kirshbaum Statement of Jurisdiction in Case 155, the statement: "Julius Ruben, *appealing on the same record*, is filing a separate jurisdictional statement." (Emphasis added.) Neither Ruben nor the City nor the Dodgers has

contested this. Furthermore, the record docketed with this Court in Case 155, was shipped jointly by Ruben and counsel for Kirshbaum (see shipping label) and included the record designated by Ruben in his Notice of Appeal, wherein, on page two, he requested: "The clerk will please prepare a transcript of *the record in this cause*, for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following:" (emphasis added). Thereafter Ruben listed essentially the entire record in *Ruben v. City of Los Angeles* and the entire record pertinent to Ruben's cause in the prohibition case, *City of Los Angeles v. Superior Court of Los Angeles County*, and which pursuant to his request to the Clerk of the California Supreme Court were dockefed (together with the remainder of the prohibition case record that was docketed by Kirshbaum) with this Court *before* Ruben filed his stipulation to dismiss his appeal.

Thus, when Ruben filed with the California Supreme Court his stipulation to dismiss his appeal, that Court no longer possessed the record in the case; the record was in the possession of the United States Supreme Court.

Rule 14(1) of the Rules of this Court provides:

> "After Notice of Appeal has been filed, but before the case has been docketed in this Court, the parties may at any time dismiss the appeal by stipulation filed in *the court possessed of the record*, or that court may dismiss the appeal upon motion and notice by the appellant."

The Ruben stipulation to dismiss his appeal, having been filed in the California Court, which no longer possessed the record in the case, was therefore of no effect, and his

Notice of Appeal remained valid, and was still valid, and the time limit in which to file an appeal pursuant thereto had not expired, when Mr. Justice Black issued his order extending the time for filing an appeal in the *Ruben* case.

III.

Reply to City's Point I That No Appeal May Be Had Where Not Taken Within the Statutory Time Allowed Therefore.

Here the City bases its argument on the premise that Kirshbaum is seeking to file a new appeal. But no request has been made to file a *new* appeal. Kirshbaum seeks only to pursue and prosecute the appeal Ruben commenced, then attempted to dismiss, and has failed to prosecute, thereby jeopardizing the rights of all the taxpayers of the City of Los Angeles, including Kirshbaum. The application by Kirshbaum to intervene is for the purpose of carrying the Ruben appeal forward, not for the purpose of filing a *new* appeal.

The order issued by Mr. Justice Black has been interpreted by Kirshbaum as granting an extension of time in which to file a Statement of Jurisdiction in the appeal Ruben commenced and then at the last minute abandoned. The filing of a new Notice of Appeal, or a new appeal is in no way involved. Kirshbaum proceeded to file a Statement of Jurisdiction based on the Ruben Notice of Appeal, and, as a matter of formalizing the telegraphic request that resulted in Mr. Justice Black's order, filed concurrently a Motion to Intervene in the *Ruben* case.

The City cites *Hartford Accident and Indemnity Co. v. Bunn*, 288 U. S. 169, to support its argument that no appeal may be taken to the United States Supreme Court

after 90 days from the judgment appealed from in the state court. Kirshbaum does not dispute this. But the point is not applicable here. As stated above and as evident from Kirshbaum's telegraphic request and subsequent Motion to Intervene, Kirshbaum is not seeking, nor did he at any time seek permission to file a *new* appeal on his behalf. Kirshbaum seeks only to protect the rights of other taxpayers, and his own rights, by continuing the appeal Ruben has abandoned.

IV.

Reply to City's Point II That Parties Cannot Be Added on Appeal Who Were Not Parties to the Cause in the Court Below.

The contention here is simply not related to the facts in the case.

1. As the City certainly knows, Kirshbaum *was* a party to the cause below, namely the prohibition case, *City of Los Angeles v. Superior Court of Los Angeles County*, from the decision in which Ruben appealed, and which the City itself states in the third paragraph, on page 4 of its Brief in Opposition to Intervention, is the "subject action." *It was the City which named Kirshbaum a party.*

2. Even if Kirshbaum had not been a named party, Ruben appeared in *City of Los Angeles v. Superior Court*, according to his own statement to the Court, as a representative taxpayer on behalf of "all other taxpayers of said city" (*supra* p. 9) and all other taxpayers of Los Angeles, including Kirshbaum, were thereby joined as parties (*supra* p. 10). In fact, it is a matter of record that the City recognized that a class of taxpayers were parties to the suit when it *named them as parties in interest* in its

Petition for a Writ of Prohibition. (Sec. XI, quoted p. 2 City's Brief in Opposition to Intervention.)

3. In addition, the original *Ruben* and *Kirshbaum* taxpayer suits were tried together in the Superior Court and the issues in the *Kirshbaum* case were said to be "within the issues" of the *Ruben* case, and the judgment in the *Ruben* case was based in part on issues raised and decided in the *Kirshbaum* case. (Opinion of Sup. Ct., Appx. B, p. 26, J. S. this case, No. 291.) Also, the City concedes (City's Br. p. 4) that Ruben appeared "on behalf of taxpayers as a class." So here, again, in the original taxpayer suit Ruben filed, *Ruben v. City of Los Angeles*, Kirshbaum and all other taxpayers of Los Angeles were included as parties (*supra* p. 10). (This point may be unnecessary to make here as the City designated the prohibition case, *City of Los Angeles v. Superior Court*, as the "subject action," but the point is included in order that this Court may have all related facts before it.)

In face of the above facts, the early Admiralty cases cited by the City simply do not apply. They relate to persons who were *not* parties in the courts below, and who sought to be *added as a party* in the United States Supreme Court. And they are based on special Admiralty and prize case law. They certainly are not comparable to the important circumstances involved here, to wit: A plaintiff who once professed to represent a large group of taxpayers, now abandons that representation, and a judgment against all taxpayers can go by default unless another taxpayer, who in addition to being a member of the class is also named a party to the original action, is allowed to intervene for the purpose of continuing the appeal the pro-

fessed representative of the taxpayers commenced, but has failed to prosecute and indeed, has attempted to dismiss.

It is perhaps only necessary to consider what could occur if intervention under such circumstances were not permitted: A taxpayer, claiming to represent all taxpayers, could institute a class suit where a cause of action existed, prosecute it to the final court—in this case the United States Supreme Court—and then, waiting until the last moment (as in this case here), dismiss, or fail to prosecute the appeal. All taxpayers would then be bound by an adverse judgment by default—unless one or more were permitted to be substituted or to intervene to continue the appeal.

The danger of this occurring has been recognized. Thus Rule 23(c) of the Federal Rules of Civil Procedure provides: "A class action shall not be dismissed or compromised without the approval of the Court," and if it is a class action defined as one in which others have a "joint, or common * * * interest," (23(a)) the Court may require that notice of the proposed dismissal or compromise be given to all members of the class (23(a)-1)." Moore's Federal Practice, Volume 3, page 3549, notes that courts have ordered notice by advertisement in a general newspaper to mailing individual notification to each member of the class.

Moore also notes in Volume 3, page 3560, paragraph 5, that "a member of a class who appears in response to the Court's notice given pursuant to subdivision (c), and objects to the dismissal or compromise *has a right to appeal*

from an adverse federal judgment although he did not become a formal party of record," citing, among others:

Winkleman v. General Motors, 48 Fed. Supp. 490;

Park and Tilford, Inc. v. Schulte, 160 F. 2d 984;

American Brake Shoe and Foundry Co. v. Interborough Rapid Transit Co., 6 F. R. Serv. 73a.42.

See also:

Bender's Federal Practice, Vol. 2, p. 613.

Rule 24(a)-2 like Rule 23c may not be binding upon this Court, but Kirshbaum submits that it represents the result of long years of effort to protect the rights of those whose rights might otherwise be thwarted or impaired by the caprice of one who professes to represent a class. Rule 24 is perhaps the ultimate in refinement in the matter of intervention, sifted through years of practice, and Kirshbaum respectfully submits that the right of intervention granted by 24(a)-2, without restriction as to the stage an action has reached in the courts, "When the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action," is basically applicable to the situation presented here.

This Court has considered and ruled upon what might be described as principles closely related to those underlying Kirshbaum's motion to intervene.

In *Federal Communications Commission v. Sanders Bros. Radio Station*, 309 U. S. 470, this Court interpreted Section 4402(b) of the Communications Act to permit an appeal by a person not directly a party to the original proceedings, but whose rights were adversely affected. This

ruling has since been cited by the Court in a number of cases as a governing decision. *In Federal Communications Commission v. National Broadcasting Company*, the Court, in applying the rule, stated "* * * economic injury gave the existing station standing to present questions of public interest." (Admittedly, in both cases the Court was interpreting a privilege under a specific statute; but in doing so it apparently recognized the validity of related or similar reasoning and principles involved here.

This Court has also recognized the right of members of a class to intervene to perfect an appeal in lower appellate courts. Thus, in *Sage, et al. v. Central R.R. Co., et al.*, 93 U. S. 412, 419, when a trustee for bondholders compromised a suit, *even though it was with the permission of a majority of the bondholders*, a minority bondholder who questioned the compromise, was permitted by this Court to intervene for purposes of an appeal. Similarly, in *Williams v. Morgan*, 111 U. S. 684, 696, bondholders dissatisfied with fees to be paid under a settlement were approved by this Court as proper intervenors to perfect an appeal, as they would be "chargeable with their part of the charges." In recognizing the right of intervention in this case, this Court stated, regarding the challenged ruling of the lower court granting intervention: "We do not see how the court under the circumstances could have refused the application."

Two state decisions going specifically to the point, except only that they involve intervention by taxpayers to perfect an appeal in state appellate courts, are respectfully submitted:

In *Ash v. City of Omaha* (S. Ct., Neb., 1950), 41 N. W. 2d 386, after taxpayers had obtained a judgment to

prevent the city from purchasing a tract of land with public funds, and the city determined not to appeal, another taxpayer sought to intervene to carry forward the appeal. The Nebraska Supreme Court in rejecting the contention that this taxpayer was not a proper party to perfect the appeal, took the position that the city by failing to appeal had neglected this taxpayer's rights. Therefore, the Court ruled, the taxpayer was warranted in perfecting the appeal on behalf of the city.

The specific, basic principle involved herein is no more eloquently stated than by the Nebraska Supreme Court in *Wightman v. City of Wayne*, 22 N. W. 2d 294:

> "It should never be said that watchful citizens may be denied the right to intervene in actions where real or apparent necessity exists to protect the taxpayers against the misdoings of public officials with the public revenue or property."

In the end, it is submitted, it is entirely within the discretion of this Court to grant permission for Kirshbaum as an intervenor, or substituted party, or in such other manner as the Court may decree, to carry forward the appeal Ruben noticed, but has abandoned. Kirshbaum seeks only to present to this Court those issues, in addition to the issues Kirshbaum has raised in appeals Nos. 155 and 279, which Ruben announced he would appeal, and which Kirshbaum, both as a named party to the same cause and (as a taxpayer in Los Angeles) a party by virtue of the class nature of the case, along with other taxpayers in Los Angeles, relied upon Ruben to appeal.

Respectfully submitted,

PHILL SILVER,

Attorney for Intervenor, Louis Kirshbaum.

IN THE

Supreme Court of the United States

October Term, 1959

No. 291

JULIUS RUBEN,

Appellant,

vs.

THE CITY OF LOS ANGELES, including the members of City Council, City Clerk and Mayor,
THE LOS ANGELES DODGERS, INC.,

Appellees,

LOUIS KIRSHBAUM,

Intervenor

On Appeal From the Supreme Court of the State of California.

Reply to Brief of Los Angeles Dodgers, Inc. in Opposition to Motion of Louis Kirshbaum to Intervene as Appellant.

Appellees oppose on two ground the motion of Louis Kirshbaum to intervene in order to present to this Court the questions raised in the appeal which Julius Ruben noticed to this Court from the judgment of the California Supreme Court in *City of Los Angeles v. Superior Court*, L. A. No. 25113, 51 Cal. 2d 423.

1. Appellee argues that when Ruben filed in the California Supreme Court a Stipulation concurred in by the

City of Los Angeles and the Los Angeles Dodgers, Inc., stating "that the notice of appeal and the appeal herein of said *Julius Ruben* be dismissed, without costs," that the appeal noticed by Ruben and which Kirshbaum seeks permission to pursue, was thereby dismissed.

Although Appellees cite Rule 14(1) of the Rules of this Court, they overlook the provision therein that after a Notice of Appeal to this Court has been filed, and before the appeal is docketed (the circumstances existing when Ruben filed his Stipulation to Dismiss in the California Supreme Court), a Stipulation to Dismiss must be filed in the Court possessed of the record of the case. As Kirshbaum points out in his Reply to City's Brief in Opposition to Intervention, the California Supreme Court no longer possessed the record of the case when Ruben filed his Stipulation therein. This Court was possessed of the record, it having been docketed by Kirshbaum on June 26, 1959, when Kirshbaum filed an appeal from the same cause (Case 155, October 1959 Term), together incidentally with the records in the related cases, *Ruben v. City of Los Angeles*, and *Kirshbaum v. City of Los Angeles*, and including those portions of the record in all three cases designated by Ruben to be filed with this Court in his Notice of Appeal.

It is therefore submitted that the Ruben Stipulation to Dismiss filed with the California Supreme Court was nugatory, that his Notice of Appeal was in effect when Mr. Justice Black in reply to a request by Kirshbaum extended for 30 days the time for filing an appeal pursuant to the Ruben Notice, and that the Statement of Jurisdiction herein (Case 291), filed by Kirshbaum within the time allotted by Mr. Justice Black, was timely filed, and is a valid Statement of Jurisdiction.

These and other facts and argument are fully covered in Kirshbaum's Reply to the City's Motion in Opposition to Intervention, being filed concurrently and under the same cover, and in order to avoid undue repetition reference is made thereto with the request the Court consider the arguments and facts there presented to be incorporated here.

2. Appellees argue secondly that Kirshbaum should not be permitted to intervene to pursue the Ruben appeal because the appeal presents no substantial federal question. Kirshbaum questions whether this is a proper argument in opposition to intervention since it goes to the substance of the appeal rather than the right to intervene. Appellees raise the point also in their Motion to Dismiss the appeal and Kirshbaum answers it in his Reply to the motion. Therefore, reference is made to Kirshbaum's Reply to Dodgers' Motion to Dismiss Appeal (in this case, 291), also being filed concurrently herewith, with the request that the arguments advanced by Kirshbaum therein in answer to the point in question, be considered as also incorporated and presented here.

Respectfully submitted,

PHILL SILVER,

Attorney for Intervenor Louis Kirshbaum.